(24,869)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 586.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES P. STILES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1915.

1 Filed in Supreme Court of Ala. Jun- 19, 1915. Robt F. Ligon, Clerk.

In the Supreme Court of Alabama, Sixth Division.

No. 963.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY, Appellant,
vs.
JAMES P. STILES, Appellee.

To the Honorable John C. Anderson, Chief Justice:

Comes Kansas City, Memphis & Birmingham Railroad Company, appellant in the above-styled cause, by its attorney, Forney Johnston, and shows:

Petitioner heretofore instituted suit in the City Court of Birmingham, Alabama, against James P. Stiles. Said cause was tried on, to-wit, the 14th day of November, 1914.

The complaint, as amended, of the plaintiff in said cause consisted of four counts, for the recovery of sundry sums of money paid to the defendant, as Probate Judge of Jefferson County, Alabama, the payment of which was exacted by virtue of the provisions of Section 12 of an act of the Legislature of Alabama entitled "An Act to further provide for the revenues of the State of Alabama," approved March 31, 1911, and contained in the General Acts of Alabama, 1911, at page 170, for and on account of a franchise tax, based upon the entire capital stock of petitioner, alleged to be due and payable from petitioner to the State of Alabama.

It was averred and shown by each of the counts of said complaint that during the period involved by said action petitioner (plaintiff) was and had been for many years existing as a consolidated corporation under and by virtue of concurrent or contemporaneous laws or special acts of the States of Alabama, Mississippi, and

2 Tennessee, duly authorized under its charter to own, maintain and operate a line of railroad in, into, and through the States of Alabama, Mississippi, and Tennessee, as a common carrier of freight and passengers for hire, and to transport and carry express and United States mails upon its trains operated over said lines of railroad; and was and had been for many years engaged continuously in operating and maintaining its system of railroad as a common carrier of freight and passengers in interstate commerce, the same forming a continuous and connected line of railroad in, into, and through said States; the greater portion of the business conducted by petitioner over its said system being commerce between the State of Alabama and the States of Mississippi and Tennessee and other States of the United States, and the greater portion of its lines and properties being located in

States other than the State of Alabama, and the greater portion of its paid-up capital stock (all of which was invested in said system of railroad and property) representing and being invested or employed in States other than the State of Alabama.

It was averred that, notwithstanding such facts, for the tax years 1912 and 1913, there was exacted of petitioner a franchise tax based upon petitioner's entire outstanding capital stock.

It was urged and claimed by petitioner (plaintiff) in and by said complaint and upon the trial of said cause in said City Court of Birmingham that the exaction of said tax in the amount and on the basis above stated was illegal and void, upon the following grounds, inter alia:

(1) That said act, and particularly said Section 12 thereof, denies to petitioner (plaintiff), as a corporation organized under the laws of Alabama, the equal protection of the laws, in that it attempts to require petitioner (plaintiff), whose capital is
3 invested in other States, to pay another and different rate of tax or another and different amount of franchise tax from that which is required of like corporations organized under the laws of other States and doing business in the State of Alabama, and is, therefore, in violation of and contrary to the provisions of Article 14 of the Amendments to the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

(2) That said act, and particularly the said Section 12 thereof, in attempting to subject the capital and assets of petitioner (plaintiff) employed in its business and located in States other than the State of Alabama to taxation in said State of Alabama, and the enforcement of the collection of said tax by penalties and forfeitures in said act declared, is contrary to and in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of property without due process of law, in that the enforcement thereof would constitute the taking of petitioner's (plaintiff's) property without due process of law.

(3) Because said act, and particularly said Section 12 thereof, imposes a direct burden upon interstate commerce, in requiring petitioner (plaintiff) to pay, in addition to all other fees and taxes provided by law, a tax upon its capital stock for the right and privilege of transacting and carrying on its interstate business as a common carrier, in violation of Clause 3 of Section 8, Article I of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

4 It was also urged in the various proceedings in said cause that Section 229 of the Constitution of Alabama (1901), providing, inter alia, with reference to corporations "organized under the laws of this State":

"229. * * * The Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by cor-

porations organized under the laws of this State which shall be in proportion to the amount of capital stock. * * *"

which was not in existence when petitioner (plaintiff) was organized under the concurrent acts of the States aforesaid, nor when that company began to do business within the State of Alabama—cannot constitutionally be held applicable to appellant, organized and existing prior thereto under the concurrent action of three States; whereas Section 232 of the Constitution of Alabama (1901), having reference to foreign corporations, provided, inter alia, as follows:

"232. * * * The Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State. * * *"

It was urged that such application would be unconstitutional and void, as applied to petitioner, in that it would deprive petitioner of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and would deprive petitioner of the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it would unlawfully subject petitioner to a more onerous burden than was required by Section 232 of the Constitution of Alabama (1901), applicable to foreign corporations; and would likewise constitute a direct burden upon interstate commerce, in violation of the commerce clause of the Constitution of the United States.

The defendant in said cause demurred to said complaint and the several counts thereof, which said demurrer was sustained by the trial court, and thereupon there was a judgment in said cause by said court in favor of the defendant and against petitioner (plaintiff), and dismissing petitioner's (plaintiff's) said action. Whereupon, petitioner (plaintiff) sued out an appeal to the Supreme Court of Alabama, that being the highest court of law or equity of said State, in which a decision could be had in said cause, assigning therein as error the sustaining of defendant's demurrers.

Your petitioner shows that said complaint and each count thereof and the demurrers thereto raised and presented a Federal question in said cause; namely:

First. Whether the application of Section 12 of said act of the Legislature of the State of Alabama of 1911, in exacting a franchise tax of petitioner (plaintiff) based upon the entire amount of its capital stock, deprived petitioner (plaintiff) of its property without due process of law and of the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; or imposed a burden on interstate commerce, in violation of Clause 3 of Section 8 of Article I of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

Second. Whether Section 229 of the Constitution of Alabama (1901), providing for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of said State which should be in proportion to the amount of capital stock, was discriminatory, and therefore unlawful, as violative of the provisions of the Constitution of the United States above referred to, if applied to corporations occupying the status of petitioner (plaintiff), in view of the provisions of Section 232 of the Constitution of Alabama (1901), providing for the payment of franchise
6 taxes by foreign corporations doing business within the State of Alabama based on the actual amount of capital employed in said State.

And your petitioner alleged and contended, in and by its said complaint, and in resisting the judgment sustaining defendant's demurrers, that the exaction of said franchise tax of petitioner (plaintiff) was repugnant to and in violation of the provisions of the Constitution of the United States above referred to.

At the November Term, 1914, of the Supreme Court of Alabama, the appeal of petitioner (appellant) came on to be heard, and was argued in said Supreme Court, and on the 11th day of February, 1915, the said Supreme Court rendered its final judgment thereon, affirming the judgment and rulings of the court below, namely, the City Court of Birmingham aforesaid; and subsequently and on, to-wit, the 13th day of May, 1915, overruled petitioner's (appellant's) application for a rehearing in said cause.

Petitioner further shows that said judgment of said Supreme Court was and is a judgment in the highest court of the State of Alabama in which a decision in said cause could or can be had.

Petitioner further shows that a Federal question was presented and made in said cause, to-wit, as hereinabove set out, and that said judgment of said Supreme Court was repugnant to and in conflict with the provisions of the Constitution of the United States above referred to, and that said judgment of said Supreme Court was contrary thereto, and that a decision of said Federal question was necessary to the judgment rendered.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States to said Supreme Court of Alabama be allowed; that citation be granted and signed; that the bond herewith presented be approved; that the errors com-
7 plained of may be reviewed in the Supreme Court of the United States; and that the judgment aforesaid of said Supreme Court of Alabama be reversed.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY,
By its Attorney *in* Law and in Fact, FORNEY JOHNSTON,
Attorney and of Counsel for Petitioner.

The writ prayed for in the foregoing application is hereby allowed, upon the execution and filing of a bond in the sum of one thousand dollars, payable to James P. Stiles, in the manner and

with the conditions prescribed by law; and all further proceedings in this court are hereby stayed until the determination of this cause by the Supreme Court of the United States.

Done this 19th day of June, 1915.

JNO. C. ANDERSON,
Chief Justice of the Supreme Court of Alabama.

8 Filed — Supreme Court of Ala. Jun- 19, 1915. Robt. F. Ligon, Clerk.

In the Supreme Court of Alabama, Sixth Division.

No. 963.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY, Appellant,
vs.
JAMES P. STILES, Appellee.

I, John C. Anderson, Chief Justice of the Supreme Court of Alabama, presiding therein at the present time, and upon the argument, hearing and decision of the above-named cause in said court, do hereby certify that upon the hearing of said cause in the Supreme Court of Alabama the said Kansas City, Memphis & Birmingham Railroad Company asserted and relied upon the following rights and grounds:

First. That the provisions of Section 229 of the Constitution of Alabama (1901) are invalid or inapplicable to appellant in the premises, insofar as they purport or are construed to direct the Legislature of Alabama to require the payment to the State of Alabama of a franchise tax which shall be in proportion to the amount of its entire capital stock, whereas Section 232 of the Constitution of Alabama (1901) directs the Legislature of Alabama to require the payment to the State of Alabama of a franchise tax by foreign corporations based on the actual amount of capital employed in that State; appellant contending that the application of Section 229 of the Constitution of Alabama (1901) to appellant in the premises denies to it the equal protection of the laws, deprives it of its property without due process of law, and interferes with and restrains appellant in the conduct of its interstate commerce: all in violation of the provisions of the Constitution of the United States relative thereto.

Second. To construe Section 229 of the Constitution of
9 Alabama (1901), providing that the Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax which shall be in proportion to the amount of its capital stock, as requiring the payment of an annual franchise tax based on the par value of the entire capital stock of a corporation existing under the concurrent acts of the Legislatures of Alabama, Mississippi, and Tennessee, and engaged in interstate

commerce in Alabama prior to the adoption of Section 229 of the Constitution of Alabama of 1901, denies to appellant the equal protection of the laws, deprives it of its property without due process of law, and interferes with and restrains appellant in the conduct of its interstate commerce: all in violation of the respective provisions of the Constitution of the United States relative thereto.

Third. That Section 229 of the Constitution of Alabama (1901), having reference to the imposition of a franchise tax upon domestic coporations, is unconstitutional and void, in that it denies to this appellant the equal protection of the laws and deprives appellant of its property without due process of law, within the meaning of the provisions of the Constitution of the United States having reference thereto.

Fourth. That to construe the provision of Section 229 of the Constitution of Alabama (1901) which imposes upon the Legislature the duty of providing for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of said State which shall be in proportion to the amount of capital stock as requiring the imposition of an annual franchise tax upon corporations theretofore organized and engaged in interstate commerce between points in Alabama and points in other States prior to the adoption of the Constitution of Alabama of 1901, and without reference to the actual value or to the paid-in value of such capital stock or to the amount of capital invested by said corporation within the State or Alabama or within the tax jurisdiction of the State of Alabama, would deny to appellant the equal protection of the laws, deprive it of its property without due process of law, and interfere with and restrain appellant in the conduct of its interstate commerce: all in violation of the respective provisions of the Constitution of the United States relative thereto.

Fifth. That to construe Section 229 of the Constitution of Alabama (1901), requiring that the Legislature shall provide, by general law, for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of said State which shall be in proportion to the amount of capital stock, as having a different meaning and construction, as applied to appellant, from the meaning and construction of that provision of Section 232 of the Constitution of Alabama (1901) requiring that the Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by foreign corporations which shall be based on the amount of capital employed in said State, would likewise be violative of the provisions of the Constitution of the United States above referred to.

Sixth. That the failure to distinguish between appellant, a corporation organized under the concurrent authority of three States, for the primary purpose of engaging in interstate commerce between points in the States of Mississippi, Tennessee, and Alabama, and continuously engaged in said business within said three States from a date long prior to the adoption of the Constitution of Ala-

bama of 1901, and corporations organized solely under the
11 general laws of the State of Alabama, or organized under the laws of said State subsequent to the ratification of the Constitution of Alabama of 1901, deprives appellant of its property without due process of law, denies to it the equal protection of the laws, and interferes with and restrains appellant in the conduct of its interstate commercee: all in violation of the respective provisions of the Constitution of the United States relative thereto.

Seventh. That the exaction of a franchise tax of appellant under the provisions of Section 12 of the act of the Legislature of Alabama approved March 31, 1911, entitled "An Act to further provide for the revenues of the State of Alabama (Acts, 1911, page 170), and on the basis of its entire capital stock, denies to appellant the equal protection of the laws, deprives it of its property without due process of law, and interferes with and restrains appellant in the conduct of its interstate commerce: all in violation of the respective provisions of the Constitution of the United States relative thereto.

And I do further certify that the same rights and grounds under the Constitution of the United States were asserted by said Kansas City, Memphis & Birmingham Railroad Company or were necessarily involved in the trial of said cause in the City Court of Birmingham, in which a judgment was rendered sustaining demurrers to appellant's (plaintiff's) complaint; and that on appeal to the Supreme Court of Alabama the said judgment was affirmed, as is shown by the records of this court.

I further certify that the Supreme Court of Alabama is the highest court in law or in equity in which a decision in this cause could be had in the State of Alabama.

12 Dated this 19th day of June, 1915.

JNO. C. ANDERSON,
Chief Justice of the Supreme Court of Alabama.

13 Filed — Supreme Court of Ala. June 19, 1915. Robt. F. Ligon, Clerk.

UNITED STATES OF AMERICA:

To James P. Stiles, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, on the 19th day of July, next, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Alabama, wherein Kansas City, Memphis & Birmingham Railroad Company is the plaintiff in error and James P. Stiles is the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John C. Anderson, Chief Justice of the Supreme Court of Alabama, this 19th day of June, 1915.

JNO. C. ANDERSON,
Chief Justice of the Supreme Court of Alabama.

Service of the foregoing citation is hereby accepted and any other or different service or notice thereof is waived.

This 29th day of June, 1915.

J. P. STILES.

14 Filed — Supreme Court of Ala. Jun- 19, 1915. Robt. F. Ligon, Clerk.

In the Supreme Court of the United States.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES P. STILES, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of Alabama, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of Alabama, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit pending between Kansas City, Memphis & Birmingham Railroad Company and James P. Stiles, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, its validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or permission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of said Kansas City, Memphis & Birmingham Railroad Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice
15 done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 19th day of July, 1915, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct those errors, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the

said Supreme Court, this 19" day of June, in the Year of Our Lord One Thousand Nine Hundred and Fifteen.

[Seal of the United States District Court, Middle District of Alabama.]

HARVEY E. JONES,
Clerk of the United States District Court for the Middle District of Alabama.

Allowed by
JNO. C. ANDERSON,
Chief Justice of the Supreme Court of Alabama.

16 Filed — Supreme Court of Ala. Jun- 19, 1915. Robt. F. Ligon, Clerk.

In the Supreme Court of Alabama, Sixth Division.

No. 963.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES P. STILES, Defendant in Error.

Assignment of Errors.

The above-named Kansas City, Memphis & Birmingham Railroad Company, in connection with its petition for writ of error from the Supreme Court of the United States to the Supreme Court of Alabama, says that in the record, proceedings, decision, and final judgment of the Supreme Court of Alabama in the above-styled cause, there is manifest error, in the following particulars, to-wit:

1. The Supreme Court of Alabama erred in affirming the judgment of the City Court of Birmingham.

2. The Supreme Court of Alabama erred in not reversing the judgment of the City Court of Birmingham and remanding said cause for trial.

3. The Supreme Court of Alabama erred in affirming the judgment of the City Court of Birmingham sustaining the demurrer of defendant in error to the first count of the complaint of plaintiff in error, as amended.

4. The Supreme Court of Alabama erred in affirming the judgment of the City Court of Birmingham sustaining the demurrer of defendant in error to the second count of the complaint of plaintiff in error, as amended.

5. The Supreme Court of Alabama erred in affirming the judgment of the City Court of Birmingham sustaining the de-
17 murrer of defendant in error to the third count of the complaint of plaintiff in error, as amended.

6. The Supreme Court of Alabama erred in affirming the judg-

ment of the City Court of Birmingham sustaining the demurrer of defendant in error to the second count of the complaint of plaintiff in error, as amended.

7. The Supreme Court of Alabama erred in not sustaining the claim and assertion of plaintiff in error that Section 12 of the act of the Legislature of Alabama approved March 31, 1911, and entitled "An Act to further provide for the Revenues of the State of Alabama" (Acts, 1911, page 170), could not be applied to plaintiff in error or construed as authorizing the exaction of a franchise tax based upon its entire capital stock, without denying to plaintiff in error the equal protection of the laws, depriving it of its property without due process of law, and interfering with and restraining plaintiff in error in the conduct of its interstate commerce: all in violation of the respective provisions of the Constitution of the United States relative thereto.

8. The Supreme Court of Alabama erred in overruling and denying the claim of plaintiff in error that to deny to plaintiff in error the right to recover the franchise taxes exacted of plaintiff in error pursuant to the provisions of an act of the Legislature of Alabama approved March 31, 1911, and entitled "An Act to further provide for the revenues of the State of Alabama" (Acts, 1911, page 170), would deny to plaintiff in error the equal protection of the laws, deprive it of its property without due process of law, and interfere with and restrain plaintiff in error in the conduct of its interstate commerce: all in violation of the respective provisions of the Constitution of the United States relative thereto.

18 9. The Supreme Court of Alabama erred in failing to hold that the provisions of Section 229 of the Constitution of Alabama (1901) are invalid or inapplicable to plaintiff in error, insofar as they purport to direct the Legislature of Alabama to require the payment to that State of a franchise tax which shall be in proportion to the amount of its capital stock; whereas Section 232 of the Constitution of Alabama (1901) directs the Legislature of Alabama to require the payment to the State of Alabama of a franchise tax by foreign corporations based on the actual amount of capital employed in the State of Alabama,—by reason of the fact that such construction or application of Section 229 of the Constitution of said State would deny to plaintiff in error the equal protection of the laws, deprive it of its property without due process of law, and interfere with and restrain plaintiff in error in the conduct of its interstate commerce: in violation of the equal protection, due process, and commerce clauses of the Constitution of the United States.

10. The Supreme Court of Alabama erred in failing to hold that Section 229 of the Constitution of Alabama (1901), having reference to the imposition of a franchise tax upon domestic corporations, is unconstitutional and void, in that it denies to plaintiff in error the equal protection of the laws and deprives it of its property without due process of law, within the meaning of the provisions of the Constitution of the United States having reference thereto.

11. The Supreme Court of Alabama erred in denying to plaintiff in error a right asserted under the Constitution of the United

States, to-wit, the equal protection and due process clauses thereof, in that the Supreme Court of Alabama, by its judgment herein rendered, sustained the validity of Section 12 of the act of the Legislature of Alabama approved March 31, 1911, above re-
19 ferred to, and of Section 229 of the Constitution of Alabama (1901), against objections on the ground of their being repugnant to the Constitution and laws of the United States, if and as construed to authorize the exaction by the State of Alabama of a franchise tax of plaintiff in error based upon or in proportion to its entire capital stock.

12. The Supreme Court of Alabama erred in holding that Section 229 of the Constitution of Alabama (1901), providing that the Legislature shall, by general laws, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of said State which shall be in proportion to the amount of capital stock, should be construed as requiring the payment of an annual franchise tax based on the par value of the capital stock of corporations theretofore organized; whereas such construction, as applied to plaintiff in error in this cause, denies to it the equal protection of the laws, deprives it of its property without due process of law, and interferes with and restrains plaintiff in error in the conduct of its interstate commerce: all in violation of the respective provisions of the Constitution of the United States relative thereto.

13. The Supreme Court of Alabama erred in construing Section 229 of the Constitution of Alabama (1901), which imposes upon the Legislature the duty of providing, by general law, for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of said State which shall be in proportion to the amount of capital stock, as requiring the imposition of an annual franchise tax upon corporations theretofore organized and engaged in interstate commerce between points in Alabama and points
20 in other States prior to the adoption of the Constitution of 1901, and without reference to the actual value or the paid-in value of such capital stock, or to the amount of capital invested by said corporation within the State of Alabama or within the tax jurisdiction of said State; whereas such construction and its application to plaintiff in error denies to plaintiff in error the equal protection of the laws, deprives it of its property without due process of law, and interferes with and restrains plaintiff in error in the conduct of its interstate commerce: all in violation of the respective provisions of the Constitution of the United States relative thereto.

14. The Supreme Court of Alabama erred in construing Section 229 of the Constitution of Alabama (1901), which requires that the Legislature shall provide, by general laws, for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of said State in proportion to the amount of capital stock, as having a different meaning and construction, as applied to plaintiff in error, form the meaning and construction of that provision of Section 232 of the Constitution of Alabama (1901) requiring that the Legislature shall, by general laws, provide for the payment to the State of Alabama of a franchise tax by foreign corporations

which shall be based on the amount of capital employed in said State, thereby violating the provisions of the Constitution of the United States relative thereto.

15. The Supreme Court of Alabama erred in failing to distinguish between plaintiff in error, a corporation organized under the joint and concurrent authority of three states, for the primary purpose of engaging in interstate commerce between points in the States of Alabama, Mississippi, and Tennessee, and continuously engaged in said commerce in said three States from a date long prior to
21 the adoption of the Constitution of Alabama of 1901, and corporations organized solely under the general laws of the State of Alabama or organized under the laws of said State subsequent to the ratification of the Constitution of Alabama of 1901.

Wherefore, the said Kansas City, Memphis & Birmingham Railroad Company prays that the judgment of the Supreme Court of Alabama be reversed.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY,
By FORNEY JOHNSTON, *Attorney.*

22 *Organization.*

THE STATE OF ALABAMA,
Jefferson County:

Be it remembered that at a term of the City Court of Birmingham, begun and held for the County of Jefferson and State of Alabama, in the City of Birmingham, on the First Monday in October, in the year of our Lord Nineteen Hundred and Twelve and of the Independence of the United States of America, the 137th year; Present and Presiding the Honorables Chas. W. Ferguson, C. C. Nesmith, H. A. Sharpe and John H. Miller, Judges of said Court, also Present Sam M. Blake, Clerk and Register of said Court, and Walter K. McAdory, Sheriff of said County, the following Proceedings were had and done, to-wit:

Complaint.

In the City Court of Birmingham, Alabama.

No. —.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
JAMES P. STILES, Defendant.

First Count.

The Plaintiff, which is a corporation, claims of the defendant the sum of Twenty-four Hundred and thirty-four and 40/100 Dollars ($2,434.40), for that,

Whereas, the plaintiff is now, and was at all the dates hereinafter mentioned, a consolidated corporation, existing under and by virtue of the Laws of the State of Alabama, Mississippi and Tennessee, and is now, and was at said dates, duly authorized under its charter to own, maintain and operate a line of railroad in, into and through the said States of Alabama, Mississippi and Tennessee, as a common carrier of freight and passengers for hire, and to transport and carry express and United States mail upon its trains operated over
23 said line of railroad; and that James P. Stiles, the defendant herein, is now and was on the 31st day of January, 1913, the duly elected, qualified and acting Judge of Probate in and for said Jefferson County, in the State of Alabama, and charged as such, under the laws of said State, with the duty of collecting the franchise tax hereinafter referred to.

Plaintiff avers that it is now, and was at all the dates hereinafter mentioned, as such common carrier, the owner of and engaged in operating and maintaining a main line of railroad, extending from the City of Birmingham, in The State of Alabama, to the state line between said State of Alabama and the State of Mississippi and into the City of Memphis, in the State of Tennessee, a total distance of two hundred and sixty-four and twenty-eight hundredths (264.28) miles, together with a branch line in the said State of Mississippi, designated as its Aberdeen Branch, twelve and forty-seven hundredths (12.47) miles in length, and a branch line in the State of Alabama, designated as its "Bessemer Branch," eleven and six hundredths (11.06) miles in length, and that the total length of its said main line and said branch lines is two hundred eighty-seven and eighty-one hundredths (287.81) miles, of which mileage less than one-half (½) thereof is located in the State of Alabama.

And plaintiff avers that it is now, and was at all the dates hereinafter mentioned, engaged in operating and maintaining its said main line of railroad and said branch lines in connection therewith, as such common carrier of freight and passengers for hire, and in carrying express and United States mail in, into and through said States of Alabama, Mississippi and Tennessee, and that said main line of railroad, together with its branches, forms a continuous and connected line of railroad in, into and through said States, and that the greater portion of the business conducted by plaintiff over its said line of railroad was at said dates, and is, commerce between said State of Alabama and said States of Mississippi and Tennessee, and other states and territories of the United States.

And plaintiff further avers that the total paid up capital stock exceeds the sum of Five Million Dollars ($5,000,000) being, to-wit, the sum of Five Million Nine Hundred Seventy-six Thousand Dollars ($5,976,000), and that less than one-half (½) of its capital and assets was at said dates, and is, actually employed by the plaintiff in the State of Alabama, or is used in conducting or carrying on
24 its local or intrastate business with said state, and that the greater portion of its capital and assets was at said dates, and is, employed by said corporation in its business outside said State of Alabama.

And plaintiff further avers that it did on the 31st day of January, 1913, pay to defendant, as such Judge of Probate in and for said Jefferson County, Alabama, the sum of Twenty-four Hundred and Thirty-four and 40/100 Dollars ($2,434.40) being the amount of the franchise tax upon plaintiff's paid up capital stock of five million nine hundred seventy-six thousand dollars ($5,976,000) as aforesaid, unjustly and illegally demanded to be paid by defendant as a franchise tax for the year 1913, by and under the provisions of Section 12 of an act of the legislature of the State of Alabama, entitled "An Act to further provide for the revenues of The State of Alabama," approved March 31, 1911, and contained in the General Acts of Alabama, at page 170; that plaintiff paid said sum of Twenty-four Hundred and Thirty-four and 40/100 Dollars ($2,434.40) as aforesaid, to defendant involuntarily, under protest and under duress, being impelled thereto by reason of the severe penalties and forfeitures attempted to be imposed by said Act for failure so to do, and that plaintiff at the time of making such payment gave to the defendant written notice and warning that it would enter suit to recover said amount so paid as aforesaid; that said sum of Twenty-four Hundred and Thirty-four and 40/100 Dollars ($2,434.40) is now in the hands of the defendant, and includes the amount of such franchise tax computed on the schedule mentioned in said Section 12 of said Act, and represents the amount of said franchise tax provided for by said Act for The State of Alabama and the amount provided for the said County of Jefferson; and that although repayment of said amount has been frequently demanded of defendant by plaintiff, the defendant has refused and still refuses to pay the same or any portion thereof to the damage of the plaintiff in the sum aforesaid.

And plaintiff further avers that if plaintiff should have been subjected to the penalties and forfeitures provided by said Act for failure to pay the tax in said Act provided, it would have suffered irreparable damage, in this, that it would have been prevented from carrying on its business as a common carrier of freight and passengers in the said State of Alabama and between said state and other states and territories.

And plaintiff further avers that said sum of Twenty-four hundred and Thirty-four and 40/100 Dollars ($2,434.40) was
25 wrongfully and illegally exacted and taken from plaintiff, and has been at all times, and now is, wrongfully and illegally retained from plaintiff, by defendant, in that said Act of the legislature of the State of Alabama, aforesaid, and particularly said Section 12, thereof, is unreasonable, oppressive, unconstitutional, null and void, in this—

1. That said Act, and particularly said Section 12 thereof, denies to the plaintiff as a corporation organized under the laws of Alabama the equal protection of the laws, in that it attempts to require the plaintiff, whose capital is invested in other states, to pay another and different rate of tax, or another and different amount of franchise tax, from that which is required of like corporations organized under the laws of other states and doing business in The State of Alabama,

and is, therefore, in violation of and contrary to the provisions of Article 14 of the Amendments to the Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

2. That said Act, and particularly said Section 12 thereof, in attempting to subject the capital and assets of plaintiff, employed in its business and located in states other than the State of Alabama, to taxation in said State of Alabama, and the enforcement of the collection of said tax by penalties and forfeitures in said Act declared, is contrary to and in violation of the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, in that the enforcement thereof would constitute the taking of plaintiff's property without due process of law.

3. Because said Act, and particularly said Section 12 thereof imposes a direct burden upon interstate commerce in requiring plaintiff to pay in addition to all other fees and taxes provided by law, a tax, being the franchise tax herein specified, upon its capital stock for the right and privilege of transacting and carrying on its interstate business as a common carrier, in violation of clause 3 of Section 8, Article 1, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

Wherefore, by reason of the premises *and* the plaintiff claims of the defendant the said sum of Twenty-four hundred and thirty-four and 40/100 Dollars ($2,434.40), which was paid involun-
26 *a*trily, under protest and under duress as aforesaid, and with notice and warning to the defendant that plaintiff would sue to recover the same.

Second Count.

And plaintiff claims of the defendant the sum of Fifteen hundred Dollars ($1,500) for that

Whereas, the plaintiff is now and was at all the dates hereinafter mentioned, a consolidated corporation, existing under and by virtues of the laws of the States of Alabama, Mississippi and Tennessee, as a common carrier of freight and passengers for hire, and to transport and carry express and United States mail upon its trains operated over its said line of railroad; and that James P. Stiles, the defendant herein, in now and was on the 31st day of January, 1913, the duly elected, qualified and acting Judge of Probate in and for Jefferson County, Alabama and charged as such, under the laws of said state, with the duty of collecting the franchise tax hereinafter referred to.

Plaintiff avers that it is now, and was at all the dates hereinafter mentioned, as such common carrier, the owner of and engaged in operating and maintaining a main line of railroad, extending from the City of Birmingham, in The State of Alabama, to the state line between said State of Alabama and the State of Mississippi, thence continuing through the State of Mississippi and into the City of Memphis, in the State of Tennessee, a total distance of two hundred

and sixty-four and twenty-eight hundredths (264.28) miles, together with a branch line in the said State of Mississippi, designated as its "Aberdeen Branch," twelve and forty-seven hundredths (12.47) miles in length, and a branch line in the State of Alabama, designated as its "Bessemer Branch", eleven and six hundredths (11.06) miles in length, and that the total length of its said main line and said branch lines is two hundred eighty-seven and eighty-one hundredths (287.81) miles, of which mileage less than one-half (½) thereof is located in the State of Alabama.

And plaintiff avers that it is now, and was at all the dates hereinafter mentioned, engaged in operating and maintaining its said main line of railroad and said branch lines in connection therewith, as such common carrier of freight and passengers for hire, and in carrying express and United States mail in, into and through said States of Alabama, Mississippi and Tennessee, and that said main line of railroad, together with its branches, forms one continuous and connected line of railroad in, into and through said States,
27 and that the greater portion of the business conducted by plaintiff over its said line of railroad was at said dates, and is, commerce between said State of Alabama and said States of Mississippi and Tennessee and other states and territories of the United States.

And plaintiff further avers that its total paid up capital stock exceeds the sum of five million dollars ($5,000,000) being, to-wit, the sum of five million nine hundred seventy-six thousand Dollars ($5,976,000) and that less than one-half (½) of its capital and assets was at said dates, and is, actually employed by plaintiff in the State of Alabama, or is used in conducting or carrying on its local or intrastate business within said state, and that the greater portion of its capital and assets was at said dates, and is, employed by said corporation in its business outside said State of Alabama.

And plaintiff avers that it did on the 31st day of January, 1913, pay to defendant, as such Judge of Probate in and for said Jefferson County, the sum of Twenty-four Hundred and thirty-four and 40/100 Dollars ($2,434.40), being the amount of the franchise tax upon plaintiff's paid up capital stock of Five Million Nine Hundred Seventy-six Thousand Dollars ($5,976,000), as aforesaid, unjustly and illegally demanded to be paid by defendant as a franchise tax for the year 1913 by and under the provisions of Section 12 of an Act of the Legislature of the State of Alabama, entitled "An Act to further provide for the revenues of the State of Alabama," approved March 31, 1911, and contained in the General Acts of Alabama 1911, at page 170; that plaintiff paid said sum of Twenty-four Hundred Thirty-four and 40/100 Dollars ($2,434.40) as aforesaid to defendant involuntarily, under protest and under duress, being impelled thereto by reason of the severe penalties and forfeitures attempted to be imposed by said Act for failure so to do, and that plaintiff at the time of making such payment gave to the defendant written notice and warning that it would enter suit to recover said amount so paid as aforesaid; that said sum of Twenty-four Hundred Thirty-four and 40/100 Dollars ($2,434.40) is now in the hands of

defendant, and includes the amount of such franchise tax computed on the schedule mentioned in said Section 12 of said Act, and represents the amount of said franchise tax provided for by said Act for the State of Alabama, and the amount provided for the said County of Jefferson; and that although repayment of said amount
28 has been frequently demanded of defendant by plaintiff, defendant has refused and still refuses to pay the same or any portion thereof, to the damage of the plaintiff in the sum aforesaid.

And plaintiff further avers that if plaintiff should have been subjected to the penalties and forfeitures provided by said Act for failure to pay the tax in said Act provided, it would have suffered irreparable damage in this, that it would have been prevented from carrying on its business as a common carrier of freight and passengers in the said State of Alabama and between said State and other states and territories.

And plaintiff further avers that said sum of Twenty-four Hundred and Thirty-four and 40/100 Dollars ($2,434.40) was wrongfully and illegally exacted and taken from plaintiff, and has been at all times and now is wrongfully and illegally retained from plaintiff by defendant, in that said Act of the Legislature of The State of Alabama aforesaid, and particularly said Section 12 thereof, is unreasonable, oppressive, unconstitutional, null and void, in this—

1. That said Act, and particularly said Section 12 thereof, denies to the plaintiff as a corporation organized under the laws of Alabama, the equal protection of the laws, in that it attempts to require the plaintiff, whose capital is invested in other states, to pay another and different rate of tax, or another and different amount of franchise tax, from that which is required of like corporations organized under the laws of other states and doing business in The State of Alabama, and is, therefore, in violation of and contrary to the provisions of Article 14 of the Amendments to the Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

2. That said Act, and particularly said Section 12 thereof, in attempting to subject the capital and assets of plaintiff, employed in its business and located in states other than the State of Alabama, to taxation in said State of Alabama, and the enforcement of the collection of said tax by the penalties and forfitures in said Act declared, is contrary to and in violation of the provisions of Section 1 of the 14th Amendment of the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, in that the enforcement thereof would constitute the taking of plaintiff's property without due process of law.

29 3. Because said Act, and particularly said Section 12 thereof, imposes a direct burden upon interstate commerce in requiring plaintiff to pay in addition to all other fees and taxes provided by law, a tax, being the franchise tax herein specified, upon its capital stock for the right and privilege of transacting and carrying on its interstate business as a common carrier, in violation of

Clause 3 of Section 8 of Article 1 of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

Wherefore, by reason of the premises, the plaintiff claims of the defendant the said sum of Fifteen Hundred Dollars ($1,500) which was paid involuntarily, under protest and under duress, as aforesaid, and with notice and warning to the defendant that plaintiff would sue to recover the same.

CAMPBELL & JOHNSTON,
Attorneys for Plaintiff.

Filed in office this 25 day of March, 1913. Sam M. Blake, Clerk and Register.

Demurrer.

Comes the defendant in the above entitled cause and demurs to the complaint filed against him therein and to each count thereof, separately and severally, and for grounds of demurrer, says: Plaintiff demurs to the first count of the complaint and for grounds thereof says:

1. Said count shows upon its face that the franchise tax collected of plaintiff by the defendant was properly collected;

2. Said count shows upon its face that Section 12 of the Act approved March 31, 1911, entitled An Act "To further provide for the revenues of the State of Alabama," is a constitutional and valid enactment;

3. Said count shows upon its face that said Section 12 of said Act does not deny a corporation organized under the laws of the State of Alabama the equal protection of its laws, but that it requires the same tax of all corporations organized under its laws and proportionately requires the same tax of all corporations organized under the laws of other states doing business in Alabama;

4. That it does not appear from said count that there is any impropriety or inequality in requiring corporations organized under the laws of this State to pay a tax based upon their capital stock, while corporations organized under the laws of other states pay upon the amount of their capital employed in this State.

5. It affirmatively appears from the complaint that all corporations of like character,—that is, corporations organized under the laws of this State, are treated in the same manner;

6. It does not appear from said complaint that the division of corporations for the purposes set forth in said act is an improper or an unjust basis of division;

7. It does not appear from said count wherein the complainant has the right to complain of the tax assessed against foreign corporations;

8. The fact that plaintiff is also a corporation under the laws of

other states does not change its character as a domestic corporation in Alabama;

The defendant here now interposes the same grounds of demurrer numbered from 1 to 8, both inclusive, separately and *separately* to the second count of the complaint as if the same had here been set forth separately and severally.

ROBERT C. BRICKELL,
Attorney General;
T. H. SEAY,
Assistant Attorney General,
Attorneys for Defendant.

Filed in office April 18, 1913. Sam M. Blake, Clerk and Register.

Amendment to Complaint.

Comes the plaintiff, and, by leave of the court first had and obtained, amends its complaint heretofore filed, by adding thereto two additional counts, numbered third and fourth, inclusive, as follows:

Third Count. The plaintiff, a corporation, claims of the defendant the sum of two thousand three hundred and sixty-eight and twenty-five hundredths dollars ($2,368.25), for that—

The plaintiff is now, and was for many years prior to and during the tax year 1912, a consolidated corporation, existing under and by virtue of the laws of the States of Alabama, Mississippi and Tennessee, as hereinafter averred, and is now, and was during said period, duly authorized under its charter to own, maintain, and operate a line of railroad in, into and through the said States of Alabama, Mississippi, and Tennessee, as a common carrier of freight and passengers, for hire, and to transport and carry express
31 and United States mails upon its trains operated over said line of railroad; and that James P. Stiles, the defendant herein, is now, and was during the month of January, 1912, the duly elected, qualified and acting Judge of Probate in and for Jefferson County, in the State of Alabama, and charged, as such, under the laws of said State, with the duty of collecting the franchise tax hereinafter referred to, insofar as the same was valid and legal.

Plaintiff avers that it is now, and for many years continuously prior to the date hereof has been, the owner of and engaged as a common carrier in operating and maintaining a line of railroad, extending from the City of Birmingham, in the State of Alabama, to the state line between said State of Alabama and the State of Mississippi, thence continuing through the State of Mississippi to and into the State of Tennessee and into the City of Memphis, in the State of Tennessee, a total distance of two hundred and sixty-four and twenty-eight hundredths (264.28) miles, together with a branch line in said State of Mississippi, designated its "Aberdeen Branch", twelve and forty-seven hundredths (12.47) miles in length, and a branch line in the State of Alabama, designated its "Bessemer Branch," eleven and six hundredths (11.06) miles in length, and that the total length of its said main line and said branch lines is

two hundred and eighty-seven and eighty-one hundredths (287.81) miles of which less than one-half (½) thereof is located in the State of Alabama.

And plaintiff further avers that it is now, and has been continuously for many years prior to the date hereof, and during the tax year 1912, engaged in operating and maintaining its said main line of railroad and said branch lines in connection therewith, as such common carrier of freight and passengers, for hire, and in carrying express and United States mail in, into and through said States of Alabama, Mississippi, and Tennessee, and that said main line of railroad, together with its branches, forms one continuous and connected line of railroad in, into and through said states, and that the greater portion of the business conducted by plaintiff over its said line of railroad was, at said dates, and is, commerce between said State of Alabama and said States of Mississippi and Tennessee and other States and Territories of the United States.

And plaintiff further avers that its total paid-up capital stock invested as aforesaid in the several States mentioned exceeds the sum of Five million dollars ($5,000,000), par value, being,
32 to-wit, the sum of Five million nine hundred seventy-six thousand dollars ($5,976,000), and that less than one-half (½) of its said capital and assets was or is or ever has been employed by plaintiff in the State of Alabama, or used in conducting or carrying on its local or intrastate business within said State, or invested in said State, or located therein, and that the greater portion of its capital and assets was, on the dates herein mentioned, and at all times during the tax year 1912, and is, employed by said corporation and invested and located in its business outside of said State of Alabama.

And plaintiff further avers that it did, on, to-wit, the 15th day of January, 1912, pay to defendant, as such Judge of Probate in and for said Jefferson County, under protest, as hereinafter stated, the sum of two thousand three hundred sixty-eight and twenty-five hundredths ($2,368.25), being the amount of franchise tax estimated upon plaintiff's entire paid-up capital stock of five million nine hundred seventy-six thousand dollars ($5,976,000), and unjustly and illegally demanded by defendant to be paid as a franchise tax for the year 1912, by and under the provisions of Section 12 of an Act of the Legislature of the State of Alabama, entitled "An Act to further provide for the revenues of the State of Alabama," approved March 31st, 1911, and set forth in General Acts of Alabama of 1911, at page 170, et seq.; that plaintiff paid said sum of two thousand three hundred sixty-eight and twenty-five hundredths dollars ($2,368.25), as aforesaid, to defendant involuntarily, under protest and under duress, being impelled thereto by reason of the refusal of defendant to accept, or issue a license to plaintiff for, any less sum, and by reason of the severe penalties and forfeitures attempted to be imposed by said Act for failure to pay the franchise tax required by said Act and secure a license thereby; and that plaintiff, at the time of making such payment, gave to the defendant written notice and warning that it would enter suit to recover said

amount so paid as aforesaid; that said sum of two thousand three hundred sixty-eight and twenty-five hundredths dollars ($2,368.25) is now in the hands of defendant, and includes the amount of such franchise tax unlawfully computed on plaintiff's entire capital stock, on the basis required by said Section 12 of said Act for estimating the tax to be paid by corporations organized under the laws of the State of Alabama, and represents the franchise tax exacted
33 under the terms of said Act for the use of the State of Alabama and the amount provided for the use of said County of Jefferson; and plaintiff avers that although repayment of said amount and of the unlawful excess has been frequently demanded of defendant by plaintiff, defendant has refused and still refuses to pay the same or any portion thereof, to the damage of the plaintiff in the sum aforesaid.

And plaintiff further avers that if plaintiff had been subjected to the penalties and forfeiture provided by said Act for failure to pay the franchise tax in said Act provided, it would have suffered irreparable damage, in this: that it would have been prevented from carrying on its business as a common carrier of freight and passengers in the said State of Alabama and between said State and other States and Territories.

And plaintiff further avers that said sum of two thousand three hundred sixty-eight and twenty-five hundredths dollars ($2,368.25), was wrongfully and illegally exacted and taken from plaintiff, and has been at all times, and now is, wrongfully and illegally withheld from plaintiff by defendant, in that said Act of the Legislature of the State of Alabama aforesaid, and particularly Section 12 thereof, is unreasonable, oppressive, unconstitutional, null and void, as thus construed and applied, in this, among other respects, to-wit:

1. That said Act, and particularly said Section 12 thereof, denied to the plaintiff, as a corporation organized under the laws of the State of Alabama, the equal protection of the laws, in that it attempts to require the plaintiff, whose capital is invested in other States, to pay another and different rate of tax, or another and different amount of franchise tax, from that which is required of like corporations organized under the laws of other States and doing business in the State of Alabama, and is, therefore, in violation of and contrary to the provisions of Article 14 of the Amendments to the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

2. That said Act, and particularly said Section 12 thereof, in attempting to subject the capital and assets of plaintiff, employed in its business and located in States other than the State of Alabama, to taxation in said State of Alabama, and the enforcement of the collection of said tax by the penalties and forfeitures in said Act declared, is contrary to and in violation of the provisions of Section 1 of the 14th Amendment to the Constitution of the United
34 States, which provides that no State shall deprive any person of property without due process of law, in that the enforce-

ment thereof would constitute the taking of plaintiff's property without due process of law.

3. Because said Act, and particularly said Section 12 thereof, imposes a direct burden upon interstate commerce, in requiring plaintiff to pay, in addition to all other fees and taxes provided by law, a tax, being the franchise tax herein specified, upon its capital stock for the right and privilege of transaction and carrying on its interstate business as a common carrier, in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

Plaintiff avers, as aforesaid, that it is a consolidated corporation, made up and consisting of the consolidation of three distinct and separate corporations, under the following circumstances: A Railroad corporation organized and existing solely under the laws of the State of Tennessee acquired, constructed, owned and operated all of that part of plaintiff's line and railway situated within the State of Tennessee; a separate and distinct railroad corporation, organized and existing solely under the laws of the State of Mississippi, acquired, constructed, owned and operated all that part of plaintiff's line and railway situated within the State of Mississippi, and a separate and distinct railroad corporation, organized and existing solely under the laws of the State of Alabama, acquired, constructed, owned and operated all that part of plaintiff's line of railway situated within the State of Alabama. Plaintiff avers that said separate railroad corporations, being desirous of operating said distinct and separately owned properties as a single system, for the conduct of the business of a common carrier in interstate commerce, as well as the continuation of intra-state commerce within said several States, before the period mentioned or involved herein, and for the purpose of facilitating the operation of said system, and by virtue of concurrent or contemporaneous laws or special acts of said several States, including the States of Tennessee and Mississippi, as well as the State of Alabama, consolidated themselves into a corporation known as Kansas City, Memphis & Birmingham Railroad Company, the plaintiff herein, and, in pursuance of the laws of each of said States, duly filed their agreements and instruments consolidating said companies, and complying with the laws of each of said States authorizing the same. And plaintiff avers that by said consolidation the
35 shares of stock of said several companies were surrendered by the holders thereof and in lieu thereof there were issued the shares of stock of said consolidated company, the plaintiff herein—being the capital stock of plaintiff issued and outstanding as aforesaid. Plaintiff further avers that the capital stock on which said franchise tax was estimated and exacted as aforesaid was and is the capital stock issued and outstanding under the circumstances aforesaid, although less than one-half thereof was issued in lieu of the stock of or represents the property or assets or business of the Alabama corporation which became a constituent of the plaintiff by consolidation as aforesaid. And plaintiff avers that said consolida-

tion was consummated prior to the year 1889, and that continuously since said consolidation plaintiff has been engaged in the operation of its aforesaid business in and between the several States mentioned, as herein averred.

Wherefore, by reason of the premises, the plaintiff claims of the defendant the sum of two thousand three hundred sixty-eight and twenty-five hundredths dollars ($2,368.25) which was paid involuntarily under protest and under duress, as aforesaid, and with notice and warning to the defendant that plaintiff would sue to recover the same.

Fourth Count.

Plaintiff claims of the defendant the further sum of fifteen hundred dollars ($1,500.00), and, as a part of this count in that behalf, plaintiff refers to and adopts each and all of the words of averment of the foregoing Third Count, excepting the first clause thereof, reading as follows, "The plaintiff, a corporation, claims of the defendant the sum of two thousand three hundred and sixty-eight and twenty-five hundredths dollars ($2,368.25), for that —" and excepting the last paragraph thereof, beginning with the words, "Wherefore, by reason of the premises," and concluding with the words, "and with notice and warning to the defendant that plaintiff would sue to recover the same;" and plaintiff adds thereto the following words of averment:

Plaintiff avers that the fifteen hundred dollars ($1,500.00) sought to be recovered in and by this count is the amount of excess exacted of plaintiff by virtue of the provisions of said Act of the Legislature of Alabama, over and above the amount of the franchise tax which would be payable by plaintiff, on the basis fixed by said Act, on the amount of capital actually invested by plaintiff in the State of Alabama or employed by plaintiff in its business in
36 the State of Alabama for and during the tax year 1912, and, in like manner, represents the excess paid by plaintiff over and above the amount which plaintiff would have been required to pay, according to the terms of said Act, had plaintiff been allowed to pay said tax on the same basis on which corporations organized under the laws of States other than the State of Alabama, and doing business within the State of Alabama, were required to pay said tax.

Wherefore, by reason of the premises, plaintiff claims of the defendant the said sum of fifteen hundred dollars ($1,500.00), which was paid involuntarily, under protest and under duress, as aforesaid, and with notice and warning to the defendant that plaintiff would sue to recover the same.

Amendment of Counts One and Two.

Plaintiff further amends its complaint herein, by adding the following words of averment at the end of Counts One and Two, respectively:

Plaintiff avers that it is a consolidated corporation, made up and

consisting of the consolidation of three distinct and separate corporations, under the following circumstances:

A railroad corporation organized and existing solely under the laws of the State of Tennessee, acquired, constructed, owned and operated all of that part of plaintiff's line and railway situated within the State of Tennessee; a separate and distinct railroad corporation, organized and existing solely under the laws of the State of Mississippi, acquired, constructed, owned and operated all that part of plaintiff's line and railway situated within the State of Mississippi; and a separate and distinct railroad corporation, organized and existing solely under the laws of the State of Alabama, acquired, constructed, owned and operated all that part of plaintiff's line and railway situated within the State of Alabama. Plaintiff avers that said separate railroad corporations, being desirous of operating said distinct and separately owned properties as a single system, for the conduct of the business of a common carrier in interstate commerce, as well as the continuation of intra-state commerce within said several States, before the period mentioned or involved herein, and by virtue of concurrent or contemporaneous laws or special acts of said several States, including the States of Tennessee and Mississippi, as well as the State of Alabama, consolidated themselves into a corporation known as Kansas City, Memphis & Birmingham
37 Railroad Company, the plaintiff herein, and, in pursuance of the laws of each of said States, duly filed therein agreements and instruments consolidating said companies, and complying with the laws of each of said States authorizing the same. And plaintiff avers that by said consolidation the shares of stock of said several companies were surrendered by the holders thereof and in lieu thereof there were issued the shares of stock of said consolidated company, the plaintiff herein—being the capital stock of plaintiff issued and outstanding as aforesaid. Plaintiff further avers that the capital stock on which said franchise tax was estimated and exacted as aforesaid was and is the capital stock issued and outstanding under the circumstances aforesaid, although less than one-half thereof was issued in lieu of the stock of or represents the property or assets or business of the Alabama corporation which became a constituent of the plaintiff by consolidation as aforesaid. And plaintiff avers that said consolidation was consummated prior to the year 1889, and that continuously since said consolidation plaintiff has been engaged in the operation of its aforesaid business in and between the several States mentioned, as herein averred.

FORNEY JOHNSTON,
Attorney for Plaintiff.

Filed in office Nov. 14, 1914. Sam M. Blake, Clerk and Register.

Demurrer to Amended Complaint.

Comes the defendant in the above entitled cause and demurs separately and severally to the third and fourth counts of the com-

plaint, added by amendment, and for grounds of demurrer sets down and assigns the same grounds of demurrer numbered 1 to 8 inclusive as are assigned to the first count of the complaint, separately and severally to each count, as if here set forth separately and severally.

ROBERT C. BRICKELL,
Attorney General, Attorney for Defendant.

Filed in Office Nov. 14, 1914. Sam M. Blake, Clerk and Register.

Minute Entry.

On this the 14th day of November 1914 this cause being reached on the docket and called for trial came the parties by their attorneys and the Plaintiff by leave of Court first had and obtained
38 amends its complaint as appears by a separate paper writing this day filed; the demurrers to the complaint and each count thereof as amended are by the Court heard and considered. Whereupon,

It is ordered and adjudged by the Court that said demurrers to each count be and they are hereby sustained; plaintiff now declining to plead further.

It is ordered and adjudged by the Court that the plaintiff is not entitled to have and recover of the defendant in this behalf and that the defendant go hence without day and have and recover of the plaintiff his costs in this cause expended for which execution may issue.

Security for Costs.

City Court of Birmingham.

No. 29304.

THE STATE OF ALABAMA,
Jefferson County:

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
JAMES P. STILES, Defendant.

We hereby acknowledge ourselves security for costs of appeal to Supreme Court in the above case, returnable to the present term thereof to the extent of two hundred dollars. And for the payment of the above bond, we hereby waive our right of exemption to personal property under the constitution and laws of the State of Alabama.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD CO., [L. S.]
By FORNEY JOHNSTON, *Attorney.* [L. S.]
[SEAL.] UNITED STATES FIDELITY & GUARANTY COMPANY, [L. S.]
By ED. S. MOORE, *Attorney in Fact.* [L. S.]

Taken and approved the 18th day of November, 1914. Sam M. Blake, Clerk and Register.

Filed in office this 18th day of November 1914. Sam M. Blake, Clerk & Register.

Citation of Appeal.

City Court of Birmingham.

THE STATE OF ALABAMA,
Jefferson County:

To J. P. Stiles or R. C. Brickell, Attorney General, Greeting:

Whereas, on the 18th day of November 1914 Kansas City, Memphis & Birmingham Railroad Company has taken an
39 appeal from the Judgment rendered on the 14th day of November, 1914, in the cause of James P. Stiles, against Kansas City, Memphis & Birmingham Railroad Company.

Now, you are therefore cited to appear before the Supreme Court of Alabama, within the time prescribed by law, to defend on said appeal if you think proper so to do.

Witness my hand this 18th day of November, 1914.

SAM M. BLAKE,
Clerk and Register.

To any Sheriff of said State to execute.

Service of the foregoing citation is acknowledged and accepted this 18th day of Nov. 1914, and any further or different notice or service thereof waived.

R. C. BRICKELL,
Attorney General.

40 *Certificate.*

THE STATE OF ALABAMA,
Jefferson County:

I, Sam M. Blake, Clerk and Register of the City Court of Birmingham, in and for said State and County, do hereby certify that in the cause of Kansas City, Memphis & Birmingham Railroad Company, a corporation, vs. James P. Stiles, which was tried and determined in this Court on the 14th day of November, 1914, and appeal was taken by the Plaintiff on the 18th day of November 1914 from the Judgment rendered therein to the Supreme Court to be holden *of* and for said State, and that the foregoing pages numbered from one (1) to eighteen, (18) inclusive, contain a full, true, correct and complete copy of transcript of the record and proceedings in said cause (except such parts of the record as are required to be omitted) and a copy of the Appeal Bond given therein and the Citation to the Defendant of said Appeal.

Witness my hand and the seal of this Court, this the 20th day of November, A. D. 1914.

SAM M. BLAKE,
Clerk and Register.

41 STATE OF ALABAMA,
Judicial Department:

In the Supreme Court of Alabama, Sixth Division.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY,
Appellant,
vs.
JAMES P. STILES, Appellee.

Comes the appellant, by counsel, and says that the City Court of Birmingham erred in its several judgments and rulings upon the trial of the above styled cause in the court below in the following respects, to-wit:

(1) The court erred in rendering judgment sustaining defendant's demurrer to count One (1) of the complaint as amended.

(2) The court erred in rendering judgment sustaining defendant's demurrer to count Two (2) of the complaint as amended.

(3) The court erred in rendering judgment sustaining defendant's demurrer to count Three (3) of the complaint as amended.

(4) The court erred in rendering judgment sustaining defendant's demurrer to count Four (4) of the complaint as amended.

Wherefore appellant prays that the judgment of said City Court be reversed and this cause remanded—and, in support of this assignment of errors and appeal appellant shows and insists that by the judgment and rulings assigned as error appellant was denied rights and privileges under the Constitution and laws of the United States, inter alia, as set forth in the several counts of its complaint filed in this cause, and prays the judgment of this court thereon, as well as upon all other rights and remedies denied appellant by said judgments of the court below.

FORNEY JOHNSTON,
Attorney for Appellant.

42 Filed June 19, 1915. R. F. Ligon, Clerk.

In the Supreme Court of Alabama, Sixth Division.

No. 963.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY,
Appellant,
vs.
JAMES P. STILES, Appellee.

Know all men by these presents, That we, Kansas City, Memphis & Birmingham Railroad Company, as principal, and United States

Fidelity & Guaranty Company, as surety, are held and firmly bound unto the above-named James P. Stiles in the sum of one thousand dollars ($1,000.00), to be paid to the said James P. Stiles, for the payment of which, well and truly to be made, we bind ourselves and each of us, and our successors and assigns, firmly by these presents.

Sealed with our seals, and dated this 18th Day of June, 1915.

Whereas, the above-named Kansas City, Memphis & Birmingham Railroad Company has sued out a writ of error from the Supreme Court of the United States to the Supreme Court of Alabama, to reverse a judgment rendered in the above-entitled cause in said Supreme Court of Alabama.

Now, therefore, the condition of this obligation is such that if the above-named Kansas City, Memphis & Birmingham Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY,
By FORNEY JOHNSTON, *Attorney.*
UNITED STATES FIDELITY & GUARANTY COMPANY,
By ED. S. MOORE, *Attorney in Fact.*

Approved:
JOHN C. ANDERSON,
Chief Justice of the Supreme Court of Alabama.

43 The Supreme Court of Alabama, November Term 1914-15.

WEDNESDAY, Nov. 25th, 1915.

The Court met pursuant to adjournment.

Present:

Hon. John C. Anderson, Chief Justice;
Hon. Thomas C. McClellan, Associate Justice;
Hon. A. D. Sayre, Associate Justice;
Hon. Ed. de Graffenried, Associate Justice.

6 Div., 963.

K. C., M. & B. R. R. Co.,
vs.
JAS. P. STILES.

Appeal from Birmingham City Court.

Come the parties by attorneys, and submit this cause on briefs for decision.

44 Supreme Court of Alabama, November Term 1914-15.

THURSDAY, Feb. 11th, 1915.

The Court met pursuant to adjournment.

Present:

Hon. John C. Anderson, Chief Justice;
Hon. J. J. Mayfield, Associate Justice;
Hon. Ormond Somerville, Associate Justice;
Hon. W. H. Thomas, Associate Justice.

6 Div., 963.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD CO.
vs.
JAMES P. STILES.

Appeal from Birmingham City Court.

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs, and duly examined and understood by the Court, it is considered that in the record and proceedings of the City Court there is no error. It is therefore considered that the judgment of the City Court be in all things affirmed. It is also considered that the Appellant and United States Fidelity and Guaranty Company, surety on the appeal bond pay the costs of appeal of this Court and of the City Court.

And it appearing that said parties have waived their right of exemptions under the laws of Alabama, let executions issue accordingly.

45 Feb. 11, 1915.

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, November Term, 1914-15.

6 Div., 963.

K. C., M. & B. R. R. Co.
v.
JAMES P. STILES.

Appeal from Birmingham City Court.

Mr. Justice Somerville delivered the opinion for the Court:

We have noted the suggestion of counsel for appellant that an ampler statement of the circumstances of the organization, property holdings, and inter-relations of the triune appellant corporation dis-

tinguished this appeal from the case of K. C. M. & B. R. R. Co. v. Stiles, 62 South, 734.

We do not think there is any basis for such a distinction, and upon the principles and consideration set forth in that case, from which we see no reason to depart, we hold that the demurrer to the complaint was properly sustained, and the judgment is accordingly affirmed.

Affirmed.

All the Justices concur.

46 Filed — Supreme Court of Ala. Jun- 19, 1913. R. F. Ligon, Clerk.

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, November Term, 1912-13.

6 Div. 518.

KANSAS CITY, MEMPHIS & BIRMINGHAM R. R. Co.
v.
JAMES P. STILES.

Appeal from Birmingham City Court.

SOMERVILLE, *J.:*

The complaint shows that the plaintiff corporation is one organized under the laws of Alabama and doing business herein. By the specific language of section 12 of the Revenue Act, an annual franchise tax based upon the amount of paid up capital stock is exacted of "all corporations organized under the laws of this State." On the other hand, the franchise tax exacted of "all corporations organized under the laws of any other state, nation or territory, and doing business in this State," is based upon the "actual amount of capital employed in this State."

Plaintiff's contentions are (1) that, being a consolidated corporation with constituent parts organized also under the laws of Mississippi and Tennessee, and employing the greater part of its capital in those states, it does not fairly fall within the classification of "corporations organized under the laws of this State," but more properly under that of corporations organized under the laws of another state; and (2) that, if it be classified as a domestic corporation, then the operation of the act is in contravention of the Federal Con-
47 stitution, in that it denies to plaintiff the equal protection of the law, in effect lays a tax on the interstate commerce in which plaintiff is engaged.

1. It is clear that plaintiff's first contention is untenable. The Act embraces "all corporations organized under the laws of this State." Plaintiff is such a corporation—none the less so because

organized also under the laws of two other states. "A company chartered by, and carrying on its business in two or more states, is, for all purposes of local government, a domestic corporation in such state, and, within each state, subject to its laws as to all matters not within the exclusive control of Congress."—Stone v. Farmer's Loan & Trust Co., 116 U. S. 307. In an earlier case it was said that "where domestic and foreign railroads consolidate on terms which in effect require the consolidated company when operating in the state to be subject to its laws, the state may legislate for the company in that state precisely as it could have legislated for its own original company if no consolidation had taken place."—Peik v. Chicago etc. R. R. Co., 94 U. S. 164. See also the text, and authorities cited, in 10 Cyc. 170-172.

2. Section 229 of the Constitution of 1901 requires that "the legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this State, which shall be in proportion to the amount of capital stock." The Revenue Act undertakes the execution of this mandate.

The tax thus exacted of domestic corporations is primarily a license tax for the continued exercise of their corporate franchises.—Southern Ry. Co. v. Greene, 160 Ala., 396, 49 South, 404. The payment of such a tax is one of the conditions imposed by the sovereign power upon its own creatures, in consideration of the boon of corporate life and the enjoyment of corporate functions and powers.

The case of Ashley v. Ryan 153 U. S., 436, cannot be distinguished in principle from the case at bar. Five distinct railroad corporations, organized and operating respectively in Ohio, Michigan, Indiana, Illinois and Missouri, were consolidated into one corporation under the laws of Ohio, which required, among other
48 things, the payment of a tax or fee of one-tenth of one per cent upon the authorized capital stock of corporations for filing the articles of incorporation, and a like amount upon the increased capital stock of existing corporations for filing the certificate of increase. The consolidated corporation denied the right of the State of Ohio to collect such fees as in violation of the Federal Constitution and laws, but the court, by Mr. Justice White (now Chief Justice), said: "The question here is not the power of the State of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of a State to determine upon what conditions its laws as to the consolidation of corporations may be availed of. Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that State, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its en-

forcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

In Delaware Railroad Tax, 18 Wall. 206, 231, it was said that "the State may impose taxes upon the corporation as an entity existing under its law, as well as upon the capital stock of the Corporation, or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

In the much cited case of Horn Silver Mining Co. v. New York, 143 U. S., 305, 313, the court, by Mr. Justice Field, said: "The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interests and policy. It may impose as a condition of the grant, as well as, also, of its continued ex-
49 ercise, the payment of a specific sum each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. There can be, therefore, no possible objection to the validity of the tax prescribed by the statute of New York, so far as it relates to its own corporations." The statute referred to laid a tax upon the corporate franchise or business computed at a certain per centage on its whole capital stock. Continuing, the court concluded: "The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable * * *; the tax is levied only upon the franchise or business of the company."

These authorities are, as we are constrained to think, conclusive of the Federal questions presented by this appeal, and support the validity of the tax here complained of.

Plaintiff, however, relies for support upon the cases of Southern Ry. Co. v. Greene, 216 U. S., 412 (reversing s. c. 160 Ala. 396, 49 South. 404); W. U. Tel. Co., v. Kansas, 216 U. S., 1; Galveston, etc., R. R. Co., v. Texas, 210 U. S. 217.

In Southern Ry. Co., v. Greene, it was held that an additional franchise tax imposed upon foreign corporations, and not upon domestic ones engaged in the same business, was a denial of the equal protection of the laws, and therefore offensive to the XIVth amendment to the Federal Constitution. Said the court, by Mr. Justice Day: "We have here a foreign corporation within a State, in compliance with the laws of the State, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar busi-

ness." From the conclusion stated the Chief Justice and Justices McKenna and Holmes dissented.

In W. U. Tel. Co., v. Kansas, it was held that a state tax of one-tenth of one per cent on the foreign Telegraph Company's
50 total capital stock of $100,000,000, nearly all of which was invested in other states, and devoted in large part to interstate commerce, though called a license fee for doing intrastate business, was in fact a tax on property beyond the state, and was an unlawful burden on interstate commerce, and hence violated the Federal Constitution in both particulars.

From the conclusion stated in this case, also, the Chief Justice and Justices McKenna and Holmes dissented,—with whom was in agreement Justice Peckham, who however died prior to the decision,

Whatever may be the scope of these decisions with respect to the rights of foreign corporations, they do not, we think, involve the principles determinative of the present case.

The case of Galveston etc. R. R. Co. v. Texas, is clearly not conclusive, for there it was held merely that a state tax upon railroad companies "equal to one per cent of their gross receipts" is, as to companies doing an interstate business, a burden on interstate commerce, and hence unconstitutional. In this case, again, there was weighty dissent,—by the Chief Justice, and Justices Harlan, White and McKenna,—the dissenting theory being that the tax, though measured by gross receipts, was in fact an occupation tax, and only incidentally affected interstate commerce.

On the whole, our survey of the decisions of the Supreme Court of the United States expository of the principles that restrict state taxation of corporate franchises, leads to the conclusion that the Alabama Revenue Act is free from constitutional objection in the particulars complained of. The judgment of the trial court will therefore be affirmed.

Affirmed.

Dowell, C. J., McClellan, and Sayre, JJ., concur.

51 In the Supreme Court of Alabama.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD CO.
vs.
JAMES P. STILES.

I, Ribert F. Ligon, Clerk of the Supreme Court of the State of Alabama, by virtue of the within writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 50, both inclusive, contain a true, full and complete transcript of the record and proceedings had in said Court, together with a true and correct copy of the opinions of said Court, in the cases of Kansas City, Memphis & Birmingham Railroad Company vs. James P. Stiles (6 Div. 963), and Kansas City, Memphis & Birmingham Railroad Company vs. Stiles, (6 Div. 518), together with the original writ of error, the original citation and acceptance of service, the

original assignment of error, the petition for the writ of error, and the order allowing the writ, and copy of writ of error bond, as the same appears upon the files and records of said Supreme Court.

In testimony whereof, I have hereunto affixed my official signature, as Clerk of the Supreme Court of Alabama, and have caused the seal of said Supreme Court to be hereunto affixed at the Capital, in the City of Montgomery, Alabama, on the 13th day of July, 1915, A. D.

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

[Seal of the Supreme Court of Alabama.]

Endorsed on cover: File No. 24,869. Alabama Supreme Court. Term No. 586. Kansas City, Memphis & Birmingham Railroad Company, plaintiff in error, vs. James P. Stiles. Filed August 5th, 1915. File No. 24,869.

FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1916.

No. 586.

KANSAS CITY, MEMPHIS & BIRMINGHAM RAILROAD COMPANY, *Plaintiff in Error,*

vs.

JAMES P. STILES, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF ALABAMA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error, Kansas City, Memphis & Birmingham Railroad Company, instituted, as plaintiff in the trial court, suit in the Birmingham City Court against defendant in error, James P. Stiles, Judge of the Probate Court of Jefferson County, Alabama, to recover certain taxes which are alleged to have been erroneously exacted and retained by defendant Stiles, under color of Section 12 of the Revenue Act adopted by the Legislature of Alabama imposing a franchise tax upon "all corporations organized under the laws of this state" (Alabama).

The plaintiff railroad company is a consolidated corporation, existing by virtue of the consolidation, under concurrent acts of the States of Tennessee, Mississippi and Alabama, of three independent and distinct railroad corporations created by and formerly operating solely within the respective states mentioned. It was averred by the plaintiff that the consol-

idation by the concurrent authority of the states mentioned was for the purpose of facilitating the interstate operations of three railroads, by consolidating operations in a single system. The complaint contains separate counts for the recovery of franchise taxes exacted, under the statute mentioned, for different tax years, each count of the complaint as amended averring the method of consolidation in the following language:

CONSOLIDATION AUTHORIZED BY TENNESSEE, MISSISSIPPI AND ALABAMA.

Plaintiff avers, as aforesaid, that it is a consolidated corporation, made up and consisting of the consolidation of three distinct and separate corporations, under the following circumstances: A railroad corporation organized and existing solely under the laws of the State of Tennessee acquired, constructed, owned and operated all of that part of plaintiff's line and railway situated within the State of Tennessee; a separate and distinct railroad corporation, organized and existing solely under the laws of the State of Mississippi, acquired, constructed, owned and operated all that part of plaintiff's line and railway situated within the State of Mississippi, and a separate and distinct railroad corporation, organized and existing solely under the laws of the State of Alabama, acquired, constructed, owned and operated all that part of plaintiff's line of railway situated within the State of Alabama. Plaintiff avers that said separate railroad corporations, being desirous of operating said distinct and separately owned properties as a single system, for the conduct of the business of a common carrier in interstate commerce, as well as the continuation of intra-state commerce within said several States, before the period mentioned or involved herein, and for the purpose of facilitating the operation of said system, and by virtue of concurrent or contemporaneous laws or special acts of said several States, including the States of Tennessee and Mississippi, as well as the State of Alabama, consolidated themselves into a corporation known as Kansas City, Memphis & Birmingham Railroad Company, the plaintiff herein, and, in pursuance of the laws of each of said States, duly filed their agreements and instruments consolidating said companies, and complying with the laws of each of said States authorizing the same. And plaintiff avers that by

said consolidation the shares of stock of said several companies were surrendered by the holders thereof and in lieu thereof there were issued the shares of stock of said consolidated company, the plaintiff herein—being the capital stock of plaintiff issued and outstanding as aforesaid. Plaintiff further avers that the capital stock on which said franchise tax was estimated and exacted as aforesaid was and is the capital stock issued and outstanding under the circumstances aforesaid, although less than one-half thereof was issued in lieu of the stock of or represents the property or assets or business of the Alabama corporation which became a constituent of the plaintiff by consolidation as aforesaid.

The capital stock issued by the consolidated company in lieu of and in exchange for the stock of the Tennessee company, the Mississippi company and the Alabama company amounted, as averred in the complaint, to $5,976,000.00, of which less than one-half was ever employed in the State of Alabama, or was issued in lieu of stock, property, or assets of the Alabama corporation which became a constituent of the consolidated corporation.

This consolidation became effective before the year 1889, and continuously since that date the consolidated company has conducted its interstate and intra-state railroad in Alabama, having invested in the several States in which it operates the entire capital stock of the consolidated company, of which less than one-half is employed in Alabama or represents the property or stock of the constituent Alabama corporation.

The complaint avers that the defendant Probate Judge required plaintiff to pay a franchise tax, based on the total capital stock of the consolidated corporation ($5,976,000.00); and plaintiff sued to recover the full amount of the franchise tax exacted on that basis, or, at least the excess over and above the amount of franchise tax which would be due if estimated on the amount of capital employed by the plaintiff in the State of Alabama.

It was averred that corporations transacting the same nature of business as that transacted by the plaintiff within the State were required to pay the franchise tax in question only on the amount of capital stock employed or invested by them within the State of Alabama; and that the exaction of the tax based on plaintiff's entire capital denied plaintiff the equal

protection of the law, deprived it of its property without due process and constituted a direct burden on interstate commerce.

Defendant's demurrers to the complaint were sustained by the trial court and on appeal to the Supreme Court of Alabama, and the case is here by writ of error to the Supreme Court of Alabama to review that judgment.

The inquiries involved upon this appeal are—

(1) Has the State of Alabama enacted any statute for the collection of a franchise tax from consolidated interstate railroad corporations, resulting from the consolidation, under the concurrent and indispensable consent of several States, of corporations theretofore existing solely by virtue of the laws of the respective concurring States and engaging in business only in those States?

(2) Does Section 12 of the Alabama Revenue Act of 1911 (Acts, 1911, p. 170) apply to plaintiff in error, a consolidated interstate corporation, to the extent that its "paid-up capital stock" represents property or stock contributed to the consolidated corporation, or issued by the consolidated corporation, not by virtue of any law of the State of Alabama, but under the laws of the State in which the property was situated, whose consent was indispensable to the transfer, both as to such property and as to the issue of stock by the consolidated company for the same?

(3) Has the State of Alabama the power to exact a franchise tax of a consolidated interstate railroad corporation organized in the manner above stated, based on the total amount of the capital stock of the consolidated corporation, and without taking into account the amount of property employed by the corporation without the State, or without allowing for the amount of its total capital stock which represents the stock of the constituent companies organized under the laws of other States and entering into the consolidation by virtue of the laws of the States creating them?

(4) Can the State of Alabama levy a tax on a consolidated interstate corporation existing by virtue of concurrent acts of the States of Alabama, Mississippi and Tennessee, based on the entire capital stock of the consolidated corporation and representing its investment, not only in the State of Alabama, but also its investment in the States of Mississippi and Tennessee, whereas corpo-

rations organized exclusively under the laws of foreign States are permitted to exercise exactly identical functions in the State of Alabama on the payment of a franchise tax based on the amount of capital stock employed by them within the State, and whereas, further, strictly domestic corporations pay a similar franchise tax based only on the amount of capital stock issued by them pursuant to the laws of Alabama?

The statutes of the States of Mississippi and Tennessee under which the consolidation of the corporations created by those States with the Alabama constituent to form the plaintiff corporation was authorized and accomplished are not necessary to be set out in detail. The Alabama statutes under which the consent of that State was given to the incorporation of the Alabama company into the consolidated company are set out in the Appendix (Code of 1886, Sections 1583, 1584, 1585, Appendix).

The constitutional and statutory provisions relative to the imposition of a franchise tax on *foreign* corporations doing business in the State of Alabama and on *"corporations organized under the laws of this State"* are also set out hereafter with sufficient references to indicate their history and judicial interpretation, as bearing on this appeal.

It is contended by the plaintiff (plaintiff in error) that there is no provision in the statutory system of the State of Alabama for the levy of a franchise tax on a consolidated corporation, such as the plaintiff in error, and that if the State of Alabama had levied or desired to levy any such franchise tax, it could not constitutionally levy the same on that part of the capital stock of the consolidated company authorized and depending upon the consent of Mississippi and Tennessee and representing or issued in lieu of the stock or property of the foreign corporations which became merged in the consolidation as a result of the indispensable statutory consent of the States of their creation; nor could it levy such franchise tax against consolidated interstate corporations made up by the consolidation of foreign and domestic units, on a basis differing radically from the basis on which it levies a franchise tax on foreign corporations pursuing exactly the same business within the State, and on a basis differing from the basis on which it levies the same tax on strictly domestic corporations,

which pay the tax, on the one hand, only on the capital employed by them in the State of Alabama and, on the other, on the stock issued by them pursuant to the laws of Alabama, whereas the State now proposes to levy the tax against plaintiff in error based on its entire stock authorized (1) by the State of Alabama and also (2) that authorized and issued pursuant to the exclusive authority of Mississippi and Tennessee and representing property, assets, and a status not employed in Alabama or subject to its jurisdiction.

It is the contention of plaintiff in error that the application of the statute as contended by defendant in error would be violative of the equal-protection and due-process clauses of the Fourteenth Amendment to the Federal Constitution and would directly burden interstate commerce in violation of the commerce clause.

STATUTORY HISTORY OF ALABAMA FRANCHISE TAX.

At the time of the consolidation above referred to, the only license or franchise provision in Alabama applicable to foreign or domestic railroad corporations was Section 1128 of the Code of 1886, which levied against "every person or corporation operating a railroad in this State," on a mileage basis, a license tax, sufficient, according to the calculation of the State Auditor, to pay the expenses of the Railroad Commission.

By Sub-section 55 of Section 4122 of the Code of 1896, "all corporations doing business in this State, *whether organized in this State or another State or country*, not otherwise specifically required to pay a license tax" were required to pay annually what is described as a privilege tax, based upon their paid-up capital stock, the minimum tax being $10.00 for corporations whose paid-up capital stock is under $1,000, and the maximum being $500.00, regardless of the amount of paid-up capital or its *situs*. Every corporation applying for the license mentioned in said section was required to accompany the same with an affidavit of the president or other chief officer of the corporation showing the amount of the capital stock of the corporation.

This tax was apparently imposed as a license tax applicable in cases where a privilege tax was not otherwise specifically exacted, and was the statute applicable alike to foreign and

domestic railroad corporations. This tax was construed as a license tax, and was sustained, against attack by a New Jersey manufacturing corporation, as a legitimate exertion of the taxing power of the State, the court saying:

> "The statute *makes no distinction between foreign and domestic corporations;* and it is well settled that a foreign corporation cannot complain that it is subject to the same law applicable to and governing domestic corporations. The extent of the tax imposed is entirely within the discretion of the taxing power."
>
> *Southern Car & Foundry Co. v. Alabama,* 133 Ala. 624.

The tax was sustained on the authority of *Horn Silver Mining Company v. New York,* 143 *U. S.* 305, and *Home Ins. Co. v. People,* 134 U. S. 594. (Italics in this brief are, for the most part, supplied.)

The Constitution of 1875, in effect at the time of the consolidation above referred to, and until the adoption of the Constitution of 1901, contained no express provision or requirement as to the levy of a franchise tax. The Constitution of 1901 contained the following important provisions:

CONSTITUTION OF 1901, SECTION 229 (DOMESTIC CORPORATIONS).

> "The Legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject, nevertheless, to repeal at the will of the Legislature; and shall pass general laws under which charters may be altered or amended. *The Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by corporations organized under the laws of this State, which shall be in proportion to the amount of capital stock;* but strictly benevolent, educational or religious corporations shall not be required to pay such a tax. The charter of any corporation shall be subject to amendment, alteration, or repeal under general laws."

CONSTITUTION OF 1901, SECTION 232 (FOREIGN CORPORATIONS).

> "No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein, and without

filing with the Secretary of State a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the State. *The Legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State.* Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

These provisions have not been directly construed, but in *Southern Railway Co. v. Greene,* 216 U. S. 400, reversing 160 Ala. 396, the Supreme Court of the United States held that, as applied to a foreign interstate corporation, which had entered the State long prior to the act of 1907, passed pursuant to Section 232, the franchise tax levied by the act of 1907 was discriminatory and unconstitutional and that the tax could not be levied on the foreign interstate corporation by a different and a more onerous rule than is used in taxing domestic corporations for the same privilege. See *infra.*

Following the adoption of the Constitution of 1901, the Legislature of 1903 adopted a provision applicable to foreign corporations, providing that every foreign corporation, except railroad and other excepted companies, should pay a license fee of one-tenth of one per centum for the use of the State and of one-half that sum for the use of the county "for the privilege of exercising its corporate franchises and for carrying on its corporate business in such corporate or organized capacity in this State, to be computed upon the basis of the actual amount of the capital employed by it within this State," leaving subdivision 55 of Section 4122 of the Code of 1896 (*supra*) applicable to domestic corporations.—Acts 1903, p. 295 (296). This act, although clearly discriminatory, was not construed by the courts on this point.

By act of March 7, 1907 (Acts, 1907, p. 364; Code, 1907, Section 2391, *et seq.*), the Legislature of Alabama imposed on every foreign business corporation authorized to do business in Alabama a graduated franchise tax, based on the actual amount of capital employed in the State, the minimum tax being 35%

where the capital employed is $100.00 or less, and the maximum tax being one-tenth of one per cent where the capital employed in Alabama is over and above $1,000,000 with no maximum proviso.

This same Legislature and the Code of 1907 (Code, 1907, Section 2361, sub-section 26) left the *license tax* imposed on "all corporations organized under the laws of this State, and doing business in this State," on the same basis as that fixed by Section 4122, subsection 55, of the Code of 1896, that is, a minimum tax of $10.00 and a maximum of $500.00.

This discrimination was held unconstitutional, as a denial of equal protection of the laws, under the Fourteenth Amendment, in *Southern Railway v. Greene*, 216 U. S. 400, the court saying:

> "It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed, because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing in the State exactly the same business as the domestic corporation is permitted to do by a tax upon its privileges, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business, under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws."

By Section 12 of the Revenue Act of 1911 (Acts, 1911, p. 170), the Legislature of Alabama provides that "all corporations organized under the laws of this State" shall pay annually the following franchise taxes: "Corporations whose paid-up capital stock does not exceed fifty thousand dollars, one dollar per

thousand of its paid-up capital stock," etc., the amount of the percentage diminishing with the increase of the stock, but being levied on or measured by the paid-up capital stock, without maximum limit. By the same section it is provided that all "corporations organized under the laws of any other State, nation or territory and doing business in this State shall pay annually" a franchise tax on the same percentage fixed for the franchise tax of domestic corporations, but based on "the amount of capital stock actually employed in this State," and authorizing foreign corporations to deduct the amount of loans secured by mortgage on which the record tax of fifteen cents per $100.00 has been paid, in ascertaining the amount of capital employed by the corporation, in the payment of its franchise tax.

The full text of this statute (Section 12) is set out in the Appendix to this brief; and under this section was levied the taxes which are sought to be recovered in this proceeding.

SPECIFICATION OF ERRORS

The sole error predicated is the judgment of the trial court and of the Supreme Court of Alabama in sustaining the demurrer of the defendant Stiles, who was sued as Probate Judge. The Attorney General appears in behalf of the defendant in error and insists that the tax was properly exacted of plaintiff in error.

The question presented on this appeal is whether the State of Alabama may constitutionally levy a franchise tax upon plaintiff in error, a consolidated, interstate railroad corporation, based, not only upon the portion of its capital stock which may properly be said to have been issued or authorized under the laws of Alabama, but also upon the majority portion of its capital stock issued under the authority of Mississippi and Tennessee, and representing capital invested and employed within the latter States, although it taxes strictly domestic corporations only on their capital stock issued under the laws of Alabama and foreign corporations only on that part of their capital employed in Alabama.

All questions argued upon this submission were fully raised below, as will more clearly appear from the certificate of the Chief Justice of the Supreme Court of Alabama (Printed Record, p. 5-6), plaintiff in error contending there and here that the application of the tax to its entire capital stock discriminates against consolidated interstate corporations comprising an Alabama constituent in favor of strictly domestic and in favor of strictly foreign corporations, and is, for that reason, violative of the equal-protection clause of the Fourteenth Amendment; and that it also violates the due-process clause of that amendment in attempting to tax a subject-matter beyond its jurisdiction, and, moreover, interferes with interstate commerce, in violation of the commerce clause of the Federal Constitution.

PROPOSITIONS AND AUTHORITIES

I.

A consolidated railroad corporation having acquired an established situs within a State in the conduct of an interstate railroad business for over twenty-five years is a "person" within the meaning of the due-process clause of the Fourteenth Amendment and also a person within the jurisdiction of the State within the meaning of the clause guaranteeing the equal protection of the laws.

Santa Clara County v. Southern Pacific R. Co., 118 U. S. 394.
Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386.
Covington, etc., Co. v. Sanford, 164 U. S. 578.
Smythe v. Ames, 169 U. S. 466.
Blake v. McClung, 172 U. S. 239.
Lake Shore, M. & S. R. Co. v. Smith, 173 U. S. 684.
Southern Ry. Co. v. Greene, 216 U. S. 400.
Northwestern, etc., Co. v. Riggs, 203 U. S. 243.
Missouri Pacific Ry. Co. v. Mackey 127 U. S. 205.
Minneapolis, etc., Ry. Co. v. Beckwith, 129 U. S. 26.
Gulf, Colorado & S. F. Ry. Co. v. Ellis, 165 U. S. 318.
Pembina Mining Co. v. Pennsylvania, 125 U. S. 181.

II.

A consolidated railroad corporation made up by the consolidation of corporations existing under the laws of several States, accomplished under concurrent statutes of the several States, does not become subject to the visitorial or regulatory power of each State as to the property lying within, or as to the resulting corporate status or incidents created by, the other States.

Lee v. Sturgis, 46 Ohio St. 153, 19 N. E. 560.
State Treasurer v. Auditor General, 46 Mich. 224, 9 N. W. 258.
Chicago, etc., Ry. Co. v. State, 51 N. E. 924.
People v. N. Y., C. & St. L. Ry. Co., 129 N. Y. 474, 15 L. R. A. 82, 29 N. E. 959.
Racine & M. R. R. Co. v. Farmers Loan & Trust Co., 49 Ill. 331, 95 Am. Dec. 595.
Chicago & N. W. R. Co. v. Auditor, 33 Mich. 79.
Delaware Railroad Tax (*Minot v. P., W. & B. R. R. Co.*), 18 Wall. 206.

III.

A corporation created by and owning property lying wholly within the States of Mississippi or Tennessee is subject, within constitutional limitations, to the exclusive jurisdiction of the state of its creation over its status, corporate incidents and property.

Authorities cited *supra*.
People v. N. Y., C. & St. L. Ry. Co., 129 N. Y. 474, 15 L. R. A. 82, 29 N. E. 959.

IV.

When such corporation joins a consolidation pursuant to the statutes of the State of its creation, exchanging the stock of the original corporation for a like amount of the stock of the consolidated corporation, the resulting corporate status, in so far as the same affects the property thus transferred and the stock representing the same, is subject to the exclusive jurisdiction of the enabling State, and the stock thus issued depends for its validity upon authority of the State thus authorizing the same and can-

not be considered as stock issued under the laws of the other States which may concur in such consolidation as to property or corporations within their respective jurisdictions.

Authorities cited *supra*.
People v. N. Y., C. & St. L. Ry. Co., 129 N. Y. 474, 15 L. R. A. 82, 29 N. E. 959.

V.

Under the common law, property and franchises within a State which have been devoted to a public use cannot be withdrawn from the public service or transferred, leased or sold, nor can the domestic corporation thus employing such property and franchises abandon its functions, without the consent of such State; and where such property is transferred to, and the corporation is absorbed in, a consolidated corporation by and with the consent of the State which has exclusive jurisdiction in the premises, the entire process, the resulting status and the issue of stock of the consolidating company for the same are responsive to the exclusive jurisdiction of the enabling State and are, in no proper sense of the term, subject to the visitorial or tax jurisdiction of other States which may have permitted their own domestic corporations to enter the consolidation.

Central Transportation Co. v. Pullman Co., 139 U. S. 24.
L. & N. R. R. Co. v. Gray, 160 Ala. 497.
American Lby. Co. v. T. V. R. Co., 45 South. 911.
M. & C. R. Co. v. Grayson, 88 Ala. 572.
Georgia v. Central R. R. & Banking Co., 101 Ala. 607.
Coyne v. Warrior Southern 137 Ala. 588.
Grangers Life, etc., Co. v. Kamper, 73 Ala. 325.

VI.

Plaintiff in error, whose organization and capitalization became effective only on complying with indispensable statutory authority granted by the States of Mississippi and Tennessee, cannot be regarded as a corporation "organized under the laws of Alabama;" nor can that portion of its capital stock issued pursuant

to the exclusive authority of those States and representing property wholly beyond the jurisdiction of Alabama, be regarded as "paid-up stock" or "stock" local to the State of Alabama and issued pursuant to its jurisdiction over domestic corporations which is alone contemplated by Section 229 of the Constitution of Alabama (1901) and Section 12 of the Revenue Act of 1911.

Authorities cited, Proposition 2, *supra*.

VII.

If section 229 of the Constitution of 1901 and Section 12 of the Revenue Act of 1911 are construed as requiring the taxation of that part of the stock of the plaintiff in error representing the acquisition of the Mississippi and Tennessee properties, and depending for its valid issue upon the authority granted by and vested exclusively in the States of Mississippi and Tennessee, the attempt would be an effort on the part of the State of Alabama to exceed its territorial jurisdiction, and would deprive plaintiff in error of its property without due process of law.

W. U. T. v. Kansas, 216 U. S. 1.
Pullman Co. v. Kansas, 216 U. S. 56.
Ludwig v. W. U. T. Co., 216 U. S. 146.
A., T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280.
Oklahoma v. Wells, Fargo & Co., 223 U. S. 298.

VIII.

The tax on the entire capital stock of plaintiff in error, without excepting that portion of its capital stock representing its investment in the States of Mississippi and Tennessee, deprives plaintiff in error of its property without due process of law.

Authorities cited, *supra*.

IX.

The exaction from plaintiff in error of a tax upon its entire capital stock, embracing both that portion of its stock which was validly authorized by the laws of Alabama and also that portion of its stock authorized by the States of Mississippi and Tennessee and representing the acquisition of property lying wholly within

those States, is discriminatory and denies to plaintiff in error the equal protection of the laws, (a) because of the fact that strictly domestic corporations are taxed only upon the stock issued pursuant to the laws of Alabama; and (b) strictly foreign corporations are taxed only on the amount of their capital employed within the State of Alabama, there being further no rational distinction between plaintiff in error and the favored classes mentioned.

Cotting v. Kansas C. Stock Yards Co., 183 U. S. 579.
Connolly v. Union Sewer Pipe Co., 184 U. S. 540.
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.
Gulf, Colorado & S. F. Ry. Co. v. Ellis, 165 U. S. 150.
Fargo v. Michigan, 121 U. S. 230.
Southern Ry. Co. v. Greene, 216 U. S. 400.

X.

The exaction of the tax in question, levied against plaintiff in error, constitutes a direct burden on interstate commerce.

W. U. T. Co. v. Kansas, 216 U. S. 1.
Pullman Co. v. Kansas, 216 U. S. 56.
Ludwig v. W. U. T. Co., 216 U. S. 146.
A., T. & S. F. Ry. Co. v. O'Connor 223 U. S. 280.
Oklahoma v. Wells, Fargo & Co., 323 U. S. 298.
Galveston & Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217.
St. L.-S. W. Ry. Co. v. Arkansas, 235 U. S. 350.
Flint v. Stone-Tracy Co., 230 U. S. 163.
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

XI.

Plaintiff in error has not waived, and cannot waive, the protection of the Fourteenth Amendment or agree that the State of Alabama may exercise extra-territorial jurisdiction.

W. U. T. Co. v. Kansas, 216 U. S. 1.
Baltic Mining Co. v. Massachusetts, 231 U. S. 68.
Southern Pacific Ry. Co. v. Denton, 146 U. S. 202.
Harrison v. St. L. & S. F. R. R. Co., 232 U. S. 318.
Herndon v. C. R. I. & P. Ry. Co., 218 U. S. 135.
Buck Stove & Range Co. v. Vickers, 226 U. S. 205.

Textbook Co. v. Pigg, 217 U. S. 91.
Pullman Co. v. Kansas, 216 U. S. 56.

XII.

The reserved power to alter or amend charters is subject to the limitation that it must be reasonably exercised and exerted within constitutional lines; that it does not authorize the taking of property without due process, and must be consistent with the scope and object of the original incorporation.

Chicago M. & St. P. R. R. Co. v. Wisconsin, 238 U. S. 491.
Shields v. Ohio, 95 U. S. 324.
Stearns v. Minnesota, 179 U. S. 223 (259).
Lake Shore, etc., R. Co. v. Smith, 173 U. S. 690.
Vicksburg v. Water Works, 202 U. S. 465.
Stanislaus County v. San Joaquin C. & I. Co., 192 U. S. 213.

BRIEF AND ARGUMENT.

THE CONSOLIDATION RESULTING IN ORGANIZATION OF PLAINTIFF IN ERROR FOR PURPOSE OF OPERATING INTERSTATE SYSTEM OF RAILROAD.

It is clear that neither the Tennessee company nor the Mississippi company required any permission from the State of Alabama to extend their lines and system into the State of Alabama for the exclusive conduct of interstate commerce in that State, and that the State of Alabama could not impose on those corporations any franchise or other tax, of any nature whatever, as a condition to the conduct of interstate commerce. The Alabama company was already organized in Alabama and authorized by its laws to carry on intra-state commerce in Alabama to its maximum capacity, and was, of course, subject to a corporation franchise tax by that State, on any constitutional basis. The State of Alabama had no power to increase or diminish the power, franchise, or liberty of either the Mississippi company or the Tennessee company to engage in interstate commerce in Alabama, or elsewhere;

and, having already conferred upon the Alabama company the franchise and right to exist as a corporation and carry on its business in Alabama to its maximum ability, we must ascertain just what the State of Alabama has done, which it had any option to refrain from doing, as a basis for the power to tax that which was, before consolidation, admittedly beyond its jurisdiction and power, to-wit, the status, property, and stock of the Mississippi company and the Tennessee company.

The complaint is clear in the averment that the consolidation was for the purpose of operating said "distinct and separately owned properties as a single system for the conduct of the business of a common carrier in interstate commerce," etc. (Tr., pp. 22-24). The first question is, whether, by consenting to the agreement of consolidation, and thus permitting interstate operations as a single system, the State of Alabama conferred on the consolidated company any new or additional franchise or right which it could tax after, but not before, the agreement of consolidation, and whether the consolidated corporation can be treated by the State of Alabama, for all purposes, as a domestic corporation and subject to the taxing power of the State as if existing solely under the law of that State and deriving its authority to transact any business whatever, as a corporation, whether intra-state or interstate, primarily by virtue of its corporate franchise granted by the State of Alabama. The State asserts that its bare consent to the consolidation has had that effect.

The sole right, status, or privilege acquired from the State of Alabama by the Tennessee and Mississippi companies in favor of the property and stockholders of those companies which they did not possess without the consent of the State of Alabama was the privilege of making the stock holdings of the three companies homogeneous, since the consolidation of operations, earnings, management, and returns to share-holders was clearly within the right of agreement enjoyed by the original companies, which the State of Alabama could not impair.

Since the State of Alabama could not constitutionally withhold its consent to a consolidation of operations in inter-

state commerce by agreement of parties, can it, by merely consenting to a bare method of consolidating such operations, thereafter tax the method thus consented to, in respects and to an extent which it could not constitutionally exert prior to the consolidation?

As said by this Court in *Fargo v. Michigan*, 121 U. S. 230 (244):

> "Nor can the States, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way."

We dispute, at the outset, the contention of the Attorney General of Alabama that the State of Alabama has declared, or can constitutionally declare, that the consolidation of several railroads, existing under the laws of different States, into a single system, recognized by each of the States, is to be regarded as a domestic corporation in each State for all purposes in the determination of constitutional rights. It is to be conceded that the resulting corporation may be a domestic corporation and a citizen of each State, within the meaning of the sundry statutes of the State or of the United States fixing venue or providing for the removal of causes. A very different question is involved when the power of the State to tax property within its jurisdiction or when the action of the State relative to interstate commerce is under consideration. This contention, if supported, would mean that each of the States consenting to the consolidation might declare that the *situs* of the entire capital stock of the consolidated corporation, for the purpose of taxation, was local in each State, and, in like manner, that the personal property of the consolidated corporation should be declared to have its *situs* for taxation in each of the consenting States.—*Corry v. Baltimore*, 196 U. S. 466. This contention, if sustained, would result in the taxation by each of the consenting States of the property rights of the stockholders in the stock of the consolidated company, and in the taxation by all of the consenting States of the intangible or movable personal property of

the company which might be given a local *situs* for taxation in each State.

This contention of the State cannot be sustained. There is, in the first place, nothing in the complaint to justify the contention that the agreements of consolidation, filed in each State pursuant to the laws of the several States, in any wise resulted in the consolidated corporation being, for all purposes, a domestic corporation in each State. In considering a constitutional question of the nature presented by this case, refined distinctions are not to be indulged in as to the question whether the corporation resulting from the agreements between the original companies, by and with the consent of the States in which they came into existence originally, resulted in a new corporation, to the extinction of the constituent entities, or in a merger preserving the identity of the constituent companies.

CHARACTER AND STATUS OF CONSOLIDATED INTERSTATE CORPORATION.

The character of the entity resulting from a consolidation of corporations of several States is well expressed in *Lee v. Sturgis* 46 Ohio St. 153, 19 N. E. 560:

> "A consolidated railroad company, composed of companies of this and other States, derives its corporate existence and rights from the laws of the respective States in which its line of railway is located, and is, therefore, strictly speaking, an interstate corporation. It is not domesticated in one but in several States. It is not the creature of one but of all the States in which it in part exists and has been enabled, by their respective statutes, to become a corporation for the ownership and management of an interstate line of railway."

In the case last cited the court construed a statute of Ohio providing that no person should be required to include, in his statement of taxable property, any shares of stock of any company which is required to list or return its capital and property for taxation in this State. This statute was held in-

applicable to shares of a railroad company formed by the consolidation of an Ohio company with companies of other States, the statute referring, in the view of the court, only to shares in that class of corporations which are *strictly domestic* and to none others, the court saying:

> "When the General Assembly uses the words, 'capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this State,' it refers to that class of corporations whose **entire** capital and property it is possible to require to be listed here. This is not possible of a railroad company made up by consolidation of an Ohio company with companies of other States. As to this feature, *it is as essentially foreign as is a strictly foreign corporation holding property within the State.*"

With reference to the power of the State to tax the capital stock of an interstate consolidated corporation, no more apt statement of the principle can be found than that of Judge Cooley in *State Treasurer v. Auditor General,* 46 Mich. 224, 9 N. W. 258:

> "The State can no more tax the whole capital stock which represents the track from Chicago to Buffalo, the rolling stock, and other equipments, than it can tax the whole track and equipments. The capital stock is taken as the basis of taxation, rather than the road and equipment, for the purposes of convenience; but, whether the one or the other is selected for the purpose, the limitations of sovereignty alike apply, and the State can tax only what is within its jurisdiction, whether it be the part of the road which is within its limits or the proportion of stock which represents that part of the road. There may sometimes be difficulty in determining what is the just proportion of the stock which is thus taxable, but the principle is plain enough."

In the case last above cited, it was specifically held that a corporation formed by the consolidation of corporations of Michigan and several other States was not a corporation "formed under" the general railroad law of Michigan, within the meaning of the Revenue Act there under consideration.

To the same effect is *Chicago, etc., Ry. Co. vs. Auditor General,* 53 Mich. 79, 18 N. W. 586.

The power of the State in the premises is well illustrated in *Delaware Railroad Rate Case,* 18 Wall. 206, in which the State taxed that portion of the capital stock of an interstate consolidated corporation actually employed within the State, and determined that a valid method of ascertaining this amount is to tax such proportion of the entire capital stock as the mileage within the State bears to the entire mileage of the company—a clear avoidance of territorial aggression.

It has been expressly held that, where a corporation of one State consolidates with a corporation of another State, the resulting corporation cannot be said to be "incorporated by or under any general or special law" of the consenting States, within the meaning of an act imposing an initial or qualifying fee or tax based on the capital stock of the corporation.—*People v. N. Y. C. & St. L. R. R. Co.,* 129 N. Y. 474, 15 L. R. A. 82, 29 N. E. 959.

The conclusion of the court in the case cited was based, not upon any lack of power in the State to condition its consent to consolidation on the payment of an initial fee, but upon the sound observation that, since the consent of the Legislature of another State is **essential** to the consolidation of a domestic corporation with one of the other State, the resulting corporation can in no proper sense be considered as existing by virtue of the laws of one only of the consenting States.

LIMITATION UPON TERRITORIAL JURISDICTION OF ALABAMA.

It is clear from the nature of the case that by consenting to the consolidation of operations in the particular method shown by the amended complaint in this cause the State of Alabama could not, and did not, acquire jurisdiction over property beyond its borders, or attempt the unconstitutional act of granting corporate powers or establishing a corporate status in Tennessee or Mississippi, or of arrogating to itself

responsibility for the transfer of property and exchange of stock resulting from the joining of the Tennessee and Mississippi companies, under the exclusive and plenary authority of those sovereignties.

It is expressly averred that the stock made the basis or measure of the tax involved on this appeal was issued not only in lieu of the stock of the Alabama company, which was surrendered in exchange for the issue of stock of the consolidated company, but also in lieu of the stock of the constituent companies existing under the laws of Tennessee and Mississippi, which was surrendered and exchanged by authority of those States. On no rational hypothesis can it be said that all of the stock of the consolidated company thus issued and outstanding was issued under or by virtue of the laws of Alabama. That State had no jurisdiction nor power to terminate the corporate existence of the Mississippi company or the Tennessee company, or provide that a new company should come into existence. For defendant in error to assert that the consolidation of operations, dependent upon the consent and operation of the statutes of Mississippi and Tennessee as well as the statutes of Alabama, is, nevertheless, as asserted by the Attorney General (printed brief, p. 12), to be regarded exclusively as the act of the State of Alabama, and that the resulting corporate status is in all respects subject to the laws of the State of Alabama as a domestic corporation, would be to extend the jurisdiction of the State of Alabama into fields which it cannot constitutionally occupy, in respect to taxation and commerce. In *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307, relied on by defendant in error, it was asserted that the Mobile & Ohio Railroad Company, *created* by the States of Alabama, Mississippi, Tennessee, and Kentucky, was, for all the purposes of local government, a domestic corporation, and that the railroad *within the State* was a matter of domestic concern. The railroad there involved was not a consolidated corporation, but was, as to each State, primarily organized by statute of that State, and the sole question for decision was whether or not the State of Mississippi had the power to regulate rates for business done ex-

clusively within the State—the court reaching the obvious conclusion that the State had the power to make all needful regulations of a police character for the government of the company while operating its road in that State, etc.; but the court was careful to point out that under its decision nothing could be done by the government of Mississippi which would operate as a burden on the interstate business of the company or *impair the usefulness of its facilities for interstate traffic.*

It is obvious that the conclusion of the court in *Stone v. Farmers Loan & Trust Co., supra,* would be as applicable to a strictly foreign corporation engaged in intra-state commerce as it was to the Mobile & Ohio Railroad Company, existing under concurrent but absolutely independent statutes of Mississippi, Alabama, etc.

In the case at bar, it is shown that the consolidation resulting in the plaintiff corporation necessarily involved the concurrent action of the several States, and presents a legal status differing radically from the independent, although coincident, action of the concurring States found in *Stone v. Farmers Loan & Trust Co., supra,* or in *Memphis, etc., R. Co. v. Alabama,* 107 U. S. 581, which involved merely a question of citizenship.

For many purposes, the corporation resulting from the consolidation of interstate corporations may be definitely regarded as domestic to each State; but, for other purposes, it is clear that any attempt by one State to assert that the consolidated corporation is to be regarded as domestic would present a conflict between sovereignties inconsistent with our Constitution.

> "From which fact it results that the question never can be resolved into the simple one of how far such a corporation may be a domestic one, but must continually be treated as the more complex one of how far such a corporation may be treated as a domestic one for the purpose under consideration."
>
> —*People v. N. Y. C. & St. L. R. R. Co.,*
> 129 N. Y. 474, 15 L. R. A. 82, 29 N. E. 959.

The consolidation of several corporations created by independent States differs radically from a consolidation of two companies existing under the laws of the same State. Speaking with reference to the consolidation of a Wisconsin and an Illinois corporation, the court said, in *Racine & M. R. R. Co. v. Farmers Loan & Trust Co.*, 49 Ill. 331, 95 Am. Dec. 608:

> "Such corporation, in a legal point of view, was, and has remained, a distinct corporation in each State, though the two have a common name, comon stock, and a common board of directors. There is a Wisconsin corporation, and there is an Illinois corporation, of the same name, and the original corporations in each State have been transmuted into these."

Where roads lying in different States are consolidated, the Legislature of no State can follow the consolidated company outside of the State, and the road cannot be taxed as if it were a single line that ran partly without the State but derived its powers from the State law.—*C. & N. W. R. R. Co. v. Auditor*, 53 Mich. 79.

It was held in the *Delaware Railroad Tax* (*Minot v. P. W. & B. R. R. Co.*), 18 Wall. 206, that:

> "The new company stood in each State as the original company had previously stood in that State, invested with the same rights and subject to the same liabilities. And the act of consolidation, so far as Delaware was concerned, had only this effect. The act of that State under which the three companies were consolidated into one * * * in no respect changed the position with reference to taxation of the new company in one of the States from that of the old company in such State."

Chief Justice Baldwin, in *Mackay v. N. Y., N. H. & H. R. R. Co.*, 82 Conn. 73, 72 Atl. 583, laid emphasis upon the amenability of a consolidated corporation to the police jurisdiction of each of the consenting States—stating that the consolidated corporation is, in each of those States, in the eye of the law, as to acts there done or to be done, a corporation of that State; asserting, however, that:

> "Neither of the States in question could confer upon it the franchise of maintaining a corporate existence in any other State, nor add to nor diminish the powers that it can exercise in any other * * * Such a consolidation, voluntarily made by the constituent corporations, with the assent of the share-holders, comes into effect *when the last step is completed* as the result of simultaneous action, and it is immaterial in which State or at what date any of these corporations was first incorporated."

It is incontestable that the consolidated corporation exists in Alabama by virtue of the laws of that State, and that if it incurs a liability under the laws of that State and is sued there it can neither escape the jurisdiction nor liability of the courts of that State by reason of the fact that it is incorporated elsewhere.—*Patch v. Wabash Railroad*, 207 U. S. 277; *Mackay v. N. Y., N. H. & H. R. R. Co., supra.* It is in this sense that the plaintiff in error is, in the particulars noted, undoubtedly a domestic corporation within the State of Alabama; but, for exactly the same reasons—that is, the impossibility of extending the jurisdiction of Mississippi and Tennessee into the State of Alabama—the latter State cannot insist that the surrender of the stock of the Mississippi and Tennessee companies and the merger of those companies in the consolidated company results by virtue of any constitutional enactment of the State of Alabama or confers upon the State of Alabama the power to tax, in the form of a franchise or otherwise, the right of the consolidated company to continue its existence as a corporation to the extent that the consolidated company has succeeded to the status of the Mississippi and Tennessee companies under the laws of those States.

From this, it results that in no proper sense of the term can the issue of the stock of the consolidated company to the stockholders of the Mississippi and Tennessee companies by virtue of the laws of those States be considered as accomplished under the laws of the State of Alabama or justify the taxing authorities of Alabama in asserting that the consolidated corporation is organized or that its total stock is issued under the laws of Alabama, within the meaning of Section 229 of the Constitu-

tion of Alabama (1901), or within the meaning of Section 12 of the Revenue Act of 1911 (Acts of Alabama, 1911, p. 170).

As is strongly suggested in *Louisville, etc., Ry. Co. v. Louisville,* 174 U. S. 552, in *Graham v. Boston,* 118 U. S. 161, and in *Nashua Railroad v. Boston Railroad,* 136 U. S. 356, all of which are cited and relied upon by defendant in error upon the question of domestication, the original Alabama incorporation which became one of the constituents of the consolidated company is, essentially and finally, the factor determining the jurisdiction of the State of Alabama, for many, if not all, purposes; and the fact that the States of Tennessee and Mississippi authorized the absorption of the original Alabama company in the consolidated company could not destroy any jurisdiction which the State of Alabama had the power to exert by reason of its creation of the original Alabama company.

PLAINTIFF IN ERROR NOT A CORPORATION ORGANIZED UNDER THE LAWS OF ALABAMA, WITIN MEANING OF SECTION 229 OF CONSTITUEION OF 1901 OR REVENUE ACT OF 1911.

The statutes of the State of Alabama authorizing the consolidation of railroad corporations "chartered under the laws of this or any other State, which, when completed, may admit the passage of burden or passenger cars over any two or more of such roads, continuously, without break or interruption," are to be found in Sections 1583, 1584 and 1585 of the Code of Alabama of 1886. (Appendix.) A reading of these sections will demonstrate too clearly for argument that a distinction must necessarily be drawn between the status resulting from a consolidation under those sections of two or more domestic corporations and the consolidation of a domestic corporation with one or more corporations existing under the laws of other States. The distinction is aptly pointed out in the opinion of the New York Court of Appeals in *People v. N. Y. C. & St. L. R. R. Co.,* 129 N. Y. 474, 15 L. R. A. 82, 29 N. E. 959, above referred to. After stating that the consolidated company there under inves-

tigation was organized under the consolidation act of 1869, which provided for consideration of railroad corporations "organized under the laws of this State or of this State and other States" it was asserted that the act plainly regards a railroad formed by a consolidation of several roads as a new corporation—pointing out that, under the general current of authority, statutes for the consolidation of domestic corporations are to be treated as acts of incorporation, and that, on consolidation being effected under their provisions, the constituent companies, unless such an intention is excluded by the language of the statute, are deemed to be dissolved, and their powers and faculties, to the extent authorized, become vested in the consolidated company, as a new corporation created by the act of consolidation. The court proceeded to point out that the State had plenary power in the creation of domestic corporations, and continued as follows:

> "It may endow them with such power and faculties as it deems proper. It may control and regulate them, and they are, under powers now almost uniformly reserved, liable to have their charters altered, amended, or repealed. It is perfectly competent for the Legislature in consolidation acts to declare what shall be the status of the domestic corporations which shall avail themselves of their provisions, and also of the consolidated company. Whether the new consolidation shall create a mere business union between the constituent companies, leaving them in existence as corporations, or whether it shall operate as a surrender of their corporate franchises and an extinguishment of their corporate existence, and as creating a new corporation, combining, to the extent permitted by the act, the powers of the corporations out of which it was formed, and vesting in it the property of the constituent companies, depends upon the legislative intention. Where, under the act, the result of the consolidation is a new corporation in place of two or more domestic corporations, the resulting entity may properly be said to be a corporation 'incorporated by or under a general or special law of this State,' and, therefore, subject to the organization tax prescribed by chapter 143 of the laws of 1886.
>
> "But the constituent companies which were united to form the New York, Chicago & St. Louis Railroad Com-

pany, with the exception of the New York company of the same name, were not domestic corporations. Their corporate powers and life were derived from the Legislatures of other States. They were, and are, in no respect subject to the laws of this State, but wholly and exclusively to the laws of their domicile. It was under these laws that the respective roads were constructed and operated. The laws of their jurisdictions fixed their capital, and conferred and defined their franchises and powers; and their power to enter into any consolidation with other roads, either within or without the States which incorporated them, depended upon the affirmative grant of such power by the State creating them. The consolidation act of 1869, it is true, assumes, on the consolidation, not only of domestic corporations, but of corporations of different States, to transfer to and vest in the consolidated company formed under its provisions all the 'rights, privileges, exemptions, and franchises and property' of each of the constituent companies. But the Legislature of this State was impotent alone to accomplish this result. It could not vest the franchises, rights, and property of the Pennsylvania, Ohio and Indiana companies in the consolidated company, nor authorize any change or conversion of the stock of the constituent corporations into the stock of the consolidated company, nor confer any exclusive authority for their consolidation. All it had the power to do, and all that the act of 1869 in effect did do, was to authorize the New York corporation, upon like consent being given by Pennsylvania, Ohio and Indiana, to merge the franchises, property and interests of the several constituents into what would practically be one corporation. When this was sanctioned by the Legislatures of the respective States, and the proper formal proceedings were taken, then, and not till then, could a new body be created. Whether the result would be a new corporation *de jure* is a mooted question. See *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *St. Louis. I. M. & S. R. Co. v. Berry*, 113 U. S. 465, 28 L. ed. 1055; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 34 L. ed. 363. But, assuming that result to follow, the new corporation would owe its existence, not to the State of New York alone, but to the States of New York, Pennsylvania, Ohio and Indiana. It would not be, in any strict, or even just, sense, a corporation 'incorporated by or under any general or special law of this State,' within chapter 143 of the laws of 1886. The consolidation act does, indeed, con-

fer new corporate powers upon the New York corporation. Except for that act, it could not have entered into the agreement of consolidation. So, also, it purports to grant corporate powers to the consolidated company. But it remains true, nevertheless, that concurrent legislation of the other States was essential to the completion of the consolidation, and it is to be inferred from the agreed statement that similar legislation to the act of 1869 was enacted in the several States. We are of opinion that the proper and equitable construction of the act of 1886, imposing an organization tax on railroads incorporated under the laws of New York,' does not bring the defendant within its provisions. This conclusion has support in the case of *State Treasurer v. Auditor General*, 46 Mich. 224; *Chicago & N. W. R. Co. v. Auditor General*, 53 Mich. 79, and *Ohio & M. R. Co. v. People*, 123 Ill. 467, 12 West Rep. 601."

The observations of the New York Court of Appeals are directly applicable to the case at bar. Among other provisions which are sufficient to demonstrate that the Legislature of Alabama cannot be regarded as exerting its exclusive jurisdiction, or as regarding the new corporation as organized exclusively under the laws of Alabama, may be pointed out that provision in Section 1583 providing that the stockholders in either of such corporations who shall refuse to convert their stock into the stock of the new corporation shall be paid not less than par for each of their shares previous to the consolidation being consummated, and providing that on two-thirds vote of the stockholders the agreements for consolidation shall be deemed to be the agreement of the two or more corporations. It is certain that the State of Alabama had no jurisdiction to enforce that procedure, if the proposed consolidation included a foreign corporation. In like manner, Section 1584 provides that, on the filing of the intercorporate agreements mentioned in Section 1583, "the two or more corporations mentioned shall be merged in the new corporation provided for in such agreement. Section 1585 provides further that the rights and franchise of each of the two or more corporations shall be deemed to be transferred to and vested in such new corporation, etc.; after which follow similar provisions which could by no possibility be considered as falling within the jurisdic-

tion of the State of Alabama, where a foreign corporation is included in the consolidation.

In short, it is too clear for successful contradiction that, where a foreign corporation is involved in the consolidation proposed under Sections 1583, *et seq.*, of the Code of 1886, those statutes cannot be said to *create* the new corporation; nor can it be said that the corporation is organized under those statutes. On the contrary, those sections merely contribute the consent of the State of Alabama to a consolidation which cannot become effective unless, and until, accompanied by similar action and concurrence on part of the State under whose laws were created the foreign corporations which propose to join in the consolidation.

FOR ALABAMA TO ASSUME EXCLUSIVE RESPONSIBILITY FOR CONSOLIDATION OR FOR STOCK REPRESENTING THE MISSISSIPPI OR TENNESSEE COMPANIES IS TO EXCEED ITS TERRITORIAL JURISDICTION, AND DEPRIVE PLAINTIFF IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS.

As applied to plaintiff in error, a consolidated interstate corporation a part of whose capital stock is paid-up under the laws of Mississippi and Tennessee (that is, the stock of the Mississippi and Tennessee companies was surrendered and those corporations were merged in the consolidated corporation solely by virtue of the laws of Tennessee and Mississippi), the attempt of the State here complained of is, clearly, to levy a tax on a subject not within the taxing power of the State.

It is a universal principle of common law that corporations cannot sell or dispose of property vested with a public interest or devoted to public use without the consent of the State in which it is used in the public interest.—*L. & N. R. R. Co. v. Gray*, 160 Ala. 497; *Central Transportation Co. v. Pullman Co.*, 139 U. S. 24;

American Lumber Co. v. T. V. R. Co., 45 South. 911; *M. & C. R. Co. v. Grayson*, 88 Ala. 572; *Georgia v. Central R. R. & Banking Co.*, 101 Ala. 607; *Coyne v. Warrior Southern*, 137 Ala. 588.

This principle is adverted to in order to demonstrate the impossibility of this consolidation, involving, as it does, the passing of title to railway properties not within the control of the State of Alabama and not situated in its jurisdiction and a readjustment of stock holdings wholly beyond the power of the State of Alabama to accomplish, being considered as an act of the Legislature of Alabama which would confer upon that State the power of taxing the process or status resulting from the indispensable legislative authority of the States of Mississippi and Tennessee. The Supreme Court of Alabama has construed this tax as primarily "a license tax for the continued exercise by domestic corporations of their corporate franchises," stating that "the payment of such a tax is one of the conditions imposed by the sovereign power upon its own creatures, in consideration of the boon of corporate life and the enjoyment of corporate functions and powers."—*K. C. M. & B. v. Stiles*, 62 South. 734, 182 Ala. 138.

The levy of the tax, accordingly, on a status or transaction accomplished solely by virtue of the laws of the States of Mississippi and Tennessee is clearly beyond the power of the State of Alabama.

PLAINTIFF IN ERROR WITHIN PROTECTION OF DUE-PROCESS AND EQUAL-PROTECTION CLAUSES OF FOURTEENTH AMENDMENT.

Corporations, regardless of the State of their creation, are, of course, persons, within the meaning of the due-process clause of the Fourteenth Amendment.—*Santa Clara County v. Southern Pacific R. Co.*, 118 U. S. 394; *Charlotte C. & A. R. Co. v. Gibbs*, 142 U. S. 386; *Covington, etc., Co. v. Sanford*, 164 U. S. 578; *Smythe v. Ames*, 169 U. S. 466; *Blake v. McClung*, 172 U. S. 239; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684; and, also, within the meaning of the clause of the Fourteenth Amendment which guarantees the equal protection of the laws, as well as within the meaning of that amendment in its entirety with the excep-

tion of that provision relating to the privileges and immunities of the citizens of the several States.—Authorities *supra; Southern Ry. Co. v. Greene,* 216 U. S. 400; *Northwestern, etc., Co. v. Riggs,* 203 U. S. 243; *Missouri Pacific Ry. Co. vs. Mackey,* 127 U. S. 205; *Minneapolis, etc., Ry. Co. v. Beckwith,* 129 U. S. 26; Gulf *C. & S. F. R. Co. v. Ellis,* 165 U. S. 150; *Pembina Consolidated S. M. & M. Co. v. Pennsylvania,* 125 U. S. 181.

EQUAL PROTECTION OF LAWS DENIED TO PLAINTIF IN ERROR.

The statute, as sought to be applied by the State of Alabama, is exactly as if it read as follows: "There shall be paid a franchise tax by all interstate consolidated corporations organized in part under the laws of Alabama, upon (1) the capital stock paid-up, in the process of consolidation, by virtue of the consent of the State of Alabama; (2) and also upon the capital stock of such consolidated corporation paid up by virtue of the consent of the laws of the State of Mississippi and Tennessee, over which the State of Alabama has no jurisdiction.

This effort, as construed by the Supreme Court of Alabama, is not only abortive as an effort to exceed its sovereignty, but is discriminatory as to plaintiff in error and invalid, for the reason that strictly domestic corporations organized under the laws of Alabama are required to pay such taxes only on the capital stock of said corporation which is paid-up or contributed under authority of the laws of the State of Alabama.

It is our insistence, primarily, that neither Section 229 of the Constitution of Alabama (1901) nor Section 12 of the Revenue Act of 1911 requires that the plaintiff in error should be subjected to this tax, for the reason that plaintiff in error is clearly not a corporation *organized under the laws of Alabama;* and that if Section 229 of the Constitution and Section 12 of the Revenue Act of 1911 should be held applicable to plaintiff in error in any constitutional sense, the requirement that the franchise tax "be in proportion to the amount of capital stock (Const. Sec. 229) and the phrase "the paid-up capital

stock" (Sec. 12, Revenue Act), on which the tax is based, must be construed as referring to the original stock issued and outstanding by virtue of the laws of Alabama and not to any additional capital stock which the corporation may have issued under agreements between the stockholders of the foreign companies, authorized and deriving validity exclusively under the sovereign authority of the States of Mississippi and Tennessee.

The latter construction is necessary to save the franchise tax system of the State of Alabama from fatal invalidity, as applied to consolidated interstate corporations of the nature of the plaintiff in error.

That the tax in question, levied against plaintiff in error, as a consolidated interstate corporation, upon its stock issued by virtue of the laws of Alabama and also upon its stock issued solely by virtue of the exclusive authority of Mississippi and Tennessee, burdens and discriminates against plaintiff in error, as contrasted with strictly domestic corporations, which are required to pay the tax only upon their Alabama stock, is clear. It is equally discriminatory as compared with strictly foreign corporations, carrying on precisely the same business in character and kind, which are required to pay the tax only upon their capital employed in Alabama.

It follows, inevitably, from the decision in *Southern Ry. Co. v Greene,* 216 U. S. 400, that the plaintiff in error is entitled to be protected against any statute of the State of Alabama which thus deprives it of the equal protection of the laws. There is, clearly, no substantial basis for distinguishing between an interstate corporation existing under concurrent acts of three States and an ordinary foreign interstate corporation existing solely under the laws of a single State. As stated by this court in the case last cited (p. 417):

> "It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. The fact is that both corporations do the same business, in character and kind, and, under the

statute in question, a foreign corporation may be taxed many thousands of dollars for the privilege of doing within the State exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws."

Cotting v. Kansas C. Stock Yards Co., 183 U. S. 579.
Connolly v. Union Sewer Pipe Co., 184 U. S. 540.
Gloucester Ferry Co. v. Pennsylvania 114 U. S. 196.
Gulf, Colorado & S. F. Ry. Co. v. Ellis, 165 U. S. 150.
Fargo v. Michigan, 121 U. S. 230.

CONTROLLING AUTHORITIES APPLYING PRINCIPLES APPLICABLE TO TAXATION OF INTERSTATE CORPORATIONS.

The plaintiff in error, being a consolidated interstate corporation, and demonstrably beyond the tax jurisdiction of the State of Alabama for many purposes, may properly invoke the general principles on which franchise taxes imposed by a State on foreign corporations or reaching property ebyond the tax jurisdiction of the State have been declared invalid.

After distinguishing cases, such as *Horn Silver Mining Co. v. New York*, 143 U. S. 305, in which a tax, computed on the amount of authorized capital stock, was made equally applicable to domestic and foreign corporations, and was sustained as against a foreign corporation on the ground that it was within the power of the State to "impose such conditions upon permitting the (foreign) corporation to do business within its limits as it may judge expedient," and after pointing out that the same conclusion may not be asserted where the tax is imposed against interstate corporations which have entered the State pursuant to its consent and have acquired fixed property and assumed public duties which are permanent in their nature—particularly where the property so acquired and

employed in its local business is closely related to the interstate business of the corporation—the Supreme Court of the United States has definitively announced that a tax of the general character reviewed in the *Horn Case* will be closely scrutinized, and that it cannot be sustained unless it is clear (1) that the tax is applied equally to domestic and foreign corporations doing precisely the same kind of business and performing the same functions; (2) that it is not levied on stock or property in such wise as to be laid on property outside of the State; and (3) that the tax is not such as to impose a burden on interstate commerce.

Southern Ry. Co. v. Greene, 216 U. S. 400;
W. U. T. Co. v. Kansas, 216 U. S. 1;
Pullman Co. v. Kansas, 216 U. S. 56;
Ludwig v. W. U. T. Co. 216 U. S. 146;
A. T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280.
Oklahoma v. Wells, Fargo & Co., 223 U. S. 298.

In this line of cases, taking *W. U. T. Co. v. Kansas*, 261 U. S. 1, as representative, a graduated charter fee, based on the authorized capital stock of foreign corporations, was declared to be unconstitutional, "as being, in effect, not simply to exert the lawful power of taxing a foreign corporation for the privilege of doing local business, but to burden interstate commerce and to reach property represented by the capital stock of the companies which was duly paid in and invested in property in many States, and, therefore, beyond the tax jurisdiction of Kansas."

The result denounced in the decisions above quoted is precisely the result worked by the franchise tax in this case, as construed by the Supreme Court of Alabama.

If a statute, "by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although the State Legislature may not have intended to enact an invalid statute."

In *Baltic Mining Co. vs. Massachusetts,* 231 U. S. 68, the Massachusetts act provided for the assessment of an excise tax on foreign corporations amounting to one-fiftieth of one per cent. of the par value of its authorized capital stock, but not to exceed in any one year the sum of two thousand dollars. This court sustained the tax in that case, as applied to the plaintiffs in error, on the ground that the case presented in *W. U. T. Co. v. Kansas, Southern Ry. Co. v. Greene,* etc., was not shown to be applicable to the plaintiffs in error in the *Baltic Case.* The court pointed out that although the plaintiffs in error were, indeed, engaged in interstate comerce,

> "the business for which the companies are chartered is not, of itself, commerce. * * * Each of the corporations in question is carrying on a purely local and domestic business, quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved."

It was also pointed out that the authorized capital on which the tax was laid was only a part of the capital of the corporations, the agreed facts showing that the total capital of the plaintiffs in error was about five times the amount of the capital stock of those corporations.

The court further observed, in distinguishing the statute; construed in the *Baltic Case* from the principle of condemnation asserted in *Southern Ry. Co. v. Greene,* that in the *Baltic Case*

> 'we do not find in this situation an acquisition of permanent property such as was shown in the *Greene Case.*"

The Chief Justice, Mr. Justice Vandevanter, and Mr. Justice Pitney dissented from the conclusion of the court which sustained the validity of the tax as levied against the corporations there complaining.

It is certain that the distinctions drawn in the *Baltic Case* cannot be invoked to sustain the tax in the case at bar.

The business of the plaintiff in error is, primarily, inter-

state commerce. The consolidation resulting in the organization of plaintiff in error was for the purpose of more effectually engaging in such commerce as a system, and that method was invited by the concurrent action of the three States which had created the constituent units. For many years, plaintiff in error has pursued its business, acquiring and operating large properties in the State. Under these circumstances, it is, unquestionably, entitled to equality of treatment, and any statute that reaches its property beyond the State of Alabama or taxes a status or privilege, or stock, created or authorized by the laws of Mississippi and Tennessee, not only deprives plaintiff in error of its property without due process of law, but interferes with its interstate business and, in the case at bar, denies to it the equal protection of the laws.

INTERFERENCE WITH INTERSTATE COMMERCE.

It is not only clear from the averments of the complaint, but an examination of Section 1583 of the Code of Alabama (1886) will demonstrate, that the consolidations there authorized are intended to facilitate the operations of the interstate system of railroad. That section of the Alabama Code provides that "where the lines of any two or more railroads or contemplated railroads, chartered under the laws of this or any other State, which, when completed, may admit the passage of burden or passenger cars over any two or more of such roads, *continuously, without break or interruptions,*" such companies are authorized to consolidate into a single corporation. It is definitely averred in the complaint that, pursuant to the consolidation for this express purpose, the plaintiff in error entered the State of Alabama as a consolidated corporation and has for about twenty years continued to exercise its interstate functions—falling squarely within the condition presented in the *Greene Case*. An examination of the statutes of Alabama will show that at the time of the consolidation no franchise tax was imposed on domestic, foreign, or consolidated railroad companies, other than a tax for the mainten-

ance of the Railroad Commission, at that time a rudimentary organization.

If the tax now levied by the State of Alabama may constitutionally be levied by the State of Alabama on the total paid-up capital of plaintiff in error, the States of Tennessee and Mississippi may do likewise, and in any event the result will be an unequal and discriminatory tax on the plaintiff in error upon an instrumentality created as a result of the joint action of the three States in order to facilitate the operations of an interstate railroad.

The case is, accordingly, squarely within the principle of the line of cases beginning with *W. U. T. Co. v. Kansas, supra,* as presenting a tax the direct effect of which is to burden interstate commerce, and which is, moreover, laid on property not subject to the tax jurisdiction of the State; and is also squarely within the principle of *Southern Railway Co. v. Greene,* for the reason that the tax clearly discriminates against plaintiff in error in favor of (1) corporations organized exclusively under the laws of a foreign State which are required to pay a franchise tax based solely on the amount of capital employed by them within the State of Alabama, and (2) in favor of corporations organized exclusively under the laws of the State of Alabama which are required to pay a franchise tax based only on their capital paid up under the authority of or deriving its validity from the laws of the State of Alabama.

Cases cited, supra: *Galveston & Harrisburg, etc., Ry. Co. v. Texas,* 210 U. S. 217, 228; *St. Louis & Southwestern Ry. Co. v. Arkansas,* 235 U. S. 350, 362; *Kansas City Ry. Co. v. Kansas,* 240 U. S. 227; *Flint v. Stone-Tracy Co.* 220 U. S. 163.

ERRONEOUS POSITION OF DEFENDANT IN ERROR IN DEFENSE OF THE FRANCHISE TAX OF 1911 AS APPLIED TO PLAINTIFF IN ERROR.

The Supreme Court of Alabama seems to recognize the controlling authority of *Southern Ry. v. Greene* and *W. U. T. Co. v. Kansas,* and avoids that result by pointing out that there was weighty dissent from the majority opinions in those cases and in

Galveston, etc., R. R. Co. v. Texas. It is certain that the conclusions announced by this court in the cases cited have become settled law in a long line of cases in which there has been no suggestion of division of opinion.

The chief reliance of the Supreme Court of Alabama and of defendant in error in support of the tax is *Horn Silver Mining Company v. New York,* 143 U. S. 305, and *Ashley v. Ryan,* 153 U. S. 436, which the Alabama court says "cannot be distinguished in principle from the case at bar" (Printed Record, p. 31, 32.) This confusion is difficult to understand, as the case is clearly distinguishable.

Ashley v. Ryan, 153 U. S. 436.

In *Ashley v. Ryan,* 153 U. S. 436, constituents of the Wabash lines existing under the laws of five States desired to consolidate, with a total capitalization of $52,000,000.00, of which only $700,000.00 represented the capital stock of the Toledo and Western, the Ohio constituent. Under the laws of Ohio, consolidation was permitted only on condition that the company proposing to consolidate by and with its assent, and thereby secure to the consolidated company certain powers, immunities and privileges which appertain to a corporation under the laws of Ohio, should file the articles of consolidation with the Secretary of State and pay a fee based on the total capital stock of the new consolidated corporation providing that "in fixing the amount of such fees, no credit shall be allowed for fees previously paid by any of the constituent corporations," etc. The incorporators of the proposed consolidated company presented their articles of consolidation and tendered only $700.00, the amount which would have been payable on the capital stock of the proposed company if estimated on the basis of, or limited to, the capital stock of the Ohio constituent. The Secretary of State demanded payment on the entire authorized capital ($52,000,000.00), which was paid under protest and made the basis of a suit for recovery, on the federal grounds that the retention of the tax would constitute an attempt on the part of the State of Ohio to lay a

burden on interstate commerce, and to give extra-territorial force to its taxing power.

The court sustained the tax on the unanswerable ground that the purpose of the tender of the articles of consolidation was to secure certain powers, immunities and privileges *which could be acquired only by grant of the State of Ohio;* that without that State's consent they could not have been procured; that it was within the unlimited discretion of the State to withhold or grant the privilege sought, and that it was, accordingly, a necessary resultant that the State might impose whatever conditions it deemed fit as a prerequisite to the grant:

> "The question here is not the power of the State of Ohio to lay a charge on interstate commerce or to prevent a foreign corporation from engaging in interstate commerce within its lines, but simply the right of the State to determine upon what conditions its laws as to the consolidation of corporations may be availed of."

For the reasons stated, it is too clear for argument that *Ashley v. Ryan* does not determine, nor does anything in that opinion suggest, that, after an interstate consolidation is effected pursuant to the consent of several States, each State may tax every factor and constituent element in the resultant corporation as if local in all respects in each State. On the contrary, the definite suggestion of *Ashley v. Ryan* is that the State may subject to its conditions only those whose privileges and rights it has the power to grant or withhold; whereas, in the case at bar, the State of Alabama is seeking to levy a tax on a status or privilege which only the States of Mississippi and Tennessee had the power to grant or withhold, to-wit, the transfer of the title of property situated and devoted to a public use in Mississippi and Tennessee by corporations of those States to the consolidated corporation and the exchange of the securities of the corporations created by those States for the securities of the consolidated corporation: subjects over which the State of Alabama never had, and never can have, control.

This may be demonstrated by assuming that all agreements and steps contemplated by Section 1583 of the Code of Ala-

bama (1886) had been complied with in Alabama, but that the State of Mississippi had withheld its consent to the transfer of the Mississippi company's property to, or the exchange of its stock for the stock of, the consolidated corporation. Would the stock so withheld from lawful issue be possibly described as being "paid-up" or authorized or issued under the laws of Alabama? Of course not. The issue and validity of that stock depends solely and exclusively on the laws of Mississippi consenting to the consolidation, and *Ashley v. Ryan* justifies no such legal monstrosity as the suggestion that Alabama may tax the consolidated company on a status, permit or privilege which the corporation enjoys solely by virtue of the grace, discretion or action of the State of Mississippi.

The whole argument of the court in *Ashley v. Ryan* was based on the sound analogy that the State may impose the same sort of conditions, in extending the right to incorporate under its laws, that it may impose on foreign corporations as a condition to the transaction of business within the consenting State.

Taking up this analogy as accurate, it has been repeatedly asserted by this court that the right of a State to exclude a foreign corporation from its borders and the right to prescribe conditions upon which it may continue to do business is subject to the limitation that no condition can be imposed which is violative of any contract right of the corporation or is in denial of any constitutional right.

Illustrative of illegal conditions are instances in which the States have sought to impose, as a condition to the exercise of corporate franchises, a surrender or waiver of the jurisdiction of the United States Courts. Thus, the act of the Legislature of Arkansas providing that—

> "the domicile of every person, firm or corporation conducting a business in person, by agent, through an office or otherwise transacting business within the State of Oklahoma, and which has complied with or may comply with the constitution and laws of the State of Oklahoma, shall be for all purposes deemed and held to be the State of Oklahoma"

was denounced and held invalid and inoperative to prevent removal in *Harrison v. St. L. & S. F. R. R. Co.*, 232 U. S. 318, in which the power of the State to deal with a corporation which was so organized that it had no authority to do anything but a purely intrastate business was clearly differentiated from its power over corporations such as plaintiff in error, citing *W. U. T. Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas;* ib. 56; *Textbook Co. v. Pigg*, 217 U. S. 91; *Buck Stove & R. Co. v. Vickers*, 226 U. S. 205, *and Herndon v. C. R. I. & P. Ry.*, 218 U. S. 135.

> "Indeed," said the court, "the ruling in the Herndon Case and in those subsequent to the Doyle and Prewit Cases, most of which were reviewed in the Herndon Case, demonstrates that no authority is afforded by those two cases for the conception that it is within the power of a State in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and laws of the United States."

And the distinction between the power of a State before an interstate corporation has been created under its laws or with its consent, or before it has been permitted to come into the borders of a State for the purpose of carrying on business, and its power over a corporation of that character after it has been transacting business for many years and has acquired a large amount of property inseparably used in interstate and intra-state commerce, and has thus become a person within the State, within the meaning of the Constitution, is clear.

The same principle protects a consolidated corporation organized by and with the concurrent assent of several States, and, indeed, protects a domestic corporation against the extraterritorial, discriminatory, or otherwise invalid, exertions of power by a State, in violation of the Constitution; and no reserved power to amend charters can deprive any corporation of the right to complain of an unconstitutional assertion of sovereignty by the State of its creation.

The case of *Peik v. Chicago, etc., R. R. Co.* 94 U. S. 164, cited by the Supreme Court of Alabama and by defendant in error,

instead of supporting the theory of the State, asserts the principle for which we contend on this appeal:

> "Where domestic and foreign railroads consolidate, on terms which, in effect, require the consolidated company, when operating in the State, to be subject to its laws, the State may legislate for the company in that State *precisely as it could have legislated for its own original company if no consolidation had taken place.*"

The vice of the present statute as construed by the Alabama courts is that the State of Alabama is not confining itself to the legislation which it might have adopted had no consolidation taken place, but is definitely exceeding that limitation, and is attempting to tax the consolidated company on a stock issue and valuation which does not derive its status or legality from any act of the State of Alabama, but was created by and is amenable to the States of Tennessee and Mississippi.

In this respect, and to the extent to which the State of Alabama attempts to subject to taxation the merger of the Mississippi and Tennessee companies, or the stock capitalization existing solely by virtue of the laws of those States, the proposed action of the State of Alabama is incontestably subject to the invalidity pointed out in *W. U. T. Co. v. Kansas* and *Pullman Co. v. Kansas*, 216 U. S. 1, *et seq.*

It is, of course, no answer for defendant in error to assert that the unconstitutional extension of the Revenue Act of 1911 is made mandatory on the Legislature by reason of Sections 229 and 232 for the Constitution of Alabama (1901).

In *K. C., F. S. & M. Ry. Co. v. Kansas*, 240 U. S. 227, cited by defendant in error, this court determined that a franchise tax or fee imposed on every domestic corporation, and graduated according to the amount of its paid-up capital stock, was not invalid, either as a violation of the commerce clause, as taxing interstate commerce, or violative of the due-process clause of the Fourteenth Amendment, as taxing property beyond the jurisdiction of the State. There was no question involved or considered in the case cited as to the equal-protection clause of the Fourteenth Amendment, and in the *Kansas City Case* it was pointed out that the maximum charge in any one year was

twenty-five hundred dollars in the case of all corporations having a paid-up capital of five million dollars or more—the court concluding with the observation that:

> "We find no ground for saying that a tax of this character, *thus limited*, is in any sense a tax imposed upon interstate commerce."

The court was careful to point out that the mere form of the tax was not conclusive, and that the substance of the exaction would be scrutinized in every case with great care. The court found, further, in that case, that the tax under investigation was simply a tax on the privilege of being a corporation—a tax "on the primary corporate franchise granted by the State." Here, the tax is, to the extent represented by the stock of the Mississippi and Tennessee companies, a tax on a primary corporate franchise, granted, not by the State of Alabama, but deriving its legal existence solely as the result of the legislative action of the States of Mississippi and Tennessee. Hence, the underlying basis on which this court sustained the tax in the *Kansas Case*—the authority of the State to tax a privilege or franchise created exclusively by it—is absent.

Unlike the *Kansas Case*, the amount of the tax is unlimited and is vitiated by indefensible discriminations not applicable in the case cited, in which the statute was clearly equal in its operation on all domestic corporations.

A tax clearly equal in its operation as applied both to domestic and foreign corporations was recently considered by this court and sustained in *St. L.-S. W. R. Co. v. Arkansas*, 235 U. S. 350, in which the franchise tax based on the capital stock of foreign and domestic corporations was levied upon that part of the capital stock of the corporation "represented by its property and business in this State." The court recognized that the franchise of a corporation is subject to taxation where its *situs* is within the territory of the taxing power, saying:

> "Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intra-state business in corporate form, *the tax being based upon the amount and value of its property within the State.*"

But in defending the act against a criticism that it contravened the constitutional guarantee respecting due process and the equal protection of the law, the court was at pains to point out that, under the act in question, each corporation organized and doing business under the laws of the State was required to pay a tax of exactly the same percentage upon "that part of its subscribed or issued and outstanding capital employed in Arkansas" which foreign corporations were required to pay "upon the proportion of the outstanding capital stock of the corporation represented by the property owned and used in business transacted in this State." The court said:

> *"It is not contended that there is here any substantial discrimination,"*

and expressly pointed out that no effort was made to show that the classification adopted by the act was unreasonable, or that in any respect corporations of the class to which the plaintiff in error belonged were discriminated against, as was the case in *Southern Ry. Co. vs. Greene,* 216 U. S. 400. Each of the elements of invalidity mentioned infect the tax applied to plaintiff in error in the case at bar.

Horn Silver Mining Co. v. New York.

The case of *Horn Silver Mining Co. v. New York,* relied on by defendant in error and by the Alabama Supreme Court, was shown in *Southern Railway v. Greene* to have no application to a case where the franchise tax is discriminatory in its operation or where it is levied against an interstate corporation which has acquired a permanent *situs* within the State, in such wise as to burden interstate commerce or to constitute an attempt to reach a

subject beyond the jurisdiction of the taxing State. The tax in the *Horn Case* was, moreover, applied equally to domestic and foreign corporations. Every element exists in the case at bar which was presented in the *Greene Case* to withdraw it from the operation of *Horn Silver Mining Co. v. New York.*

RESERVED POWER OF STATE UNDER PAR. 10, ART. XIV, CONSTITUTION OF 1875; AND ALLEGED POWER TO ABROGATE AND DESTROY CHARTER OF CONSOLIDATED INTERSTATE CORPORATIONS.

There remains for discussion the contention that the plaintiff in error being an Alabama corporation, that State has the right, under its reserved power—

> "to subsequently impose such conditions as it saw fit to the exercise of the franchise originally granted. * * * Practically the one thing the corporation could be sure of, *in accepting its Alabama charter,* was that each succeeding Legislature would doubtless modify the conditions under which existence in Alabama was possible. These conditions, as well as the charter powers, could be modified at the will of the State. * * * It already knew that its charter rights could be *absolutely abrogated, much less modified, at the will of the State.*" (Brief of defendant in error, pp. 13-14-15.)

These sweeping assertions cannot be sustained on principle. They disclose a consistent inability to distinguish between an interstate consolidated corporation and a corporation wholly domestic in origin.

It is clear that whatever local power the State of Alabama retained over the consolidated corporation, that power could not be extended so as to disturb the status resulting from the independent and sovereign action of the States of Mississippi and Tennessee, or any property right referable to that action. It cannot be rationally contended that the State of Alabama immediately acquired the power to provide for the dissolution of the consolidated company and the distribution or sale of its

assets among all of the stockholders. Its jurisdiction was limited to the field asserted by the Supreme Court in Alabama in *K. C. M. & B. v. Stiles*, 62 South. 734, quoting from *Peik v. Chicago, etc., R. R. Co.*, 94 U. S. 164:

> "The State may legislate for the company in that State precisely as it could have legislated for its own original company, if no consolidation had taken place."

The conclusion announced by Chief Justice Brickell in *Grangers Life, etc., Co. v. Kamper* (73 Ala. 325, 345-346), is pertinent:

> "The Constitution of this State reserved to the General Assembly the power of repealing, modifying, or altering at pleasure the general laws under which the corporation was formed in this State. If the power had been exercised, it cannot be supposed the corporation existing under the law of Mississippi would have been affected. It is not necessary to pursue the argument. All that can be said, is, that a corporation was created in Mississippi, having the same name, and for the same purposes, as the corporation formed in this State; but the two were distinct legal entities, and the act of incorporation of each was confined in operation to the territorial limits of the sovereignty from which it proceeded.—Ang. & Ames on Corp. Sec. 164."

And see *Nashua R. R. Co. v. Boston R. R.*, 136 U. S. 536, and *Louisville R. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, in which the entities of the constituent companies are shown to be preserved to a definite extent; and also *Mackay v. New York, New Haven & Hartford R. R.*, 82 Conn. 73, 72 N. E. 583, in which it is pointed out that a contract invalid in one of the consolidating States and enjoined by the court of that State cannot relieve the corporation from performing all the obligations in one of the other consolidating States in which the contract is valid and enforceable.

The unlimited suggestion of defendant in error that the consolidated interstate character of this corporation presents no limitation upon the right of the Legislature of Alabama to deal with the company presents a grave misconception of the power of the State.

The Alabama statutes (Code of 1886, Sections 1583, *et seq.*), do not suggest the legislative purpose to declare that a consolidation of interstate corporations, approved by those statutes, is to be regarded exclusively as an Alabama or a domestic corporation. Section 1584 provides that on complying with the procedure provided by Section 1583, and on the filing of a duplicate or counterpart copy of the inter-corporate agreements mentioned in Section 1583, "the two or more corporations mentioned shall be merged *in the new corporation provided for in such agreement,* to be known by the name therein mentioned, *and the details of such agreement shall be carried into effect as provided therein.*"

It is clear from the averments of the complaint that the agreement of consolidation resulting in the plaintiff in error contemplated a corporation of three States. "The new corporation provided for in such agreement" (Section 1584) was, accordingly, a corporation, not of the State of Alabama, but of the States of Tennessee, Mississippi and Alabama; and, if, as provided in Section 1584, the details of such agreement are to be carried into effect as provided therein, it would be repugnant to and inconsistent with the agreement for the resulting corporation to be construed as being local to the State of Alabama. It is, for these reasons, clear that the resulting corporation, when composed by consolidation of foreign and domestic corporations, pursuant to the concurrent action of different States, is not a corporation organized under the laws of either State, or a domestic corporation of either State, in the sense that either might thereafter enact statutes arbitrarily dealing with the entire consolidation, as contended by defendant in error. No such legislative intent is decipherable from Sections 1583, *et seq.* of the Code of 1886, and certainly no such authority can be sustained under Section 10 of Article 14 of the Constitution of 1875, authorizing the General Assembly "to alter, revoke, or amend any charter of incorporation * * * whenever it may be injurious to the citizens of the State * * * in such manner, however, that no injustice shall be done to the corporators."

The proviso at the end of Section 1583, to the effect that every such new corporation formed pursuant to the provisions of Section 1583, "shall keep *an office* in the State of Alabama, and be in all respects subject to the laws of Alabama as a domestic corporation," certainly goes no further toward domesticating the consolidated corporations for all purposes than the statutes in *Southern Ry. Co. v. Allison,* 190 U. S. 326, and *St. Louis & San Francisco R. R. v. James,* 161 U. S. 545, in which it was provided that the foreign corporation entering into the States of North Carolina and Arkansas, respectively, "shall become a domestic corporation of the State of North Carolina, by filing in the office of the Secretary of State a copy of its charter, duly authenticated," etc. (190 U. S. 326), or "shall to all intents and purposes become a railroad corporation of this State, subject to all the laws of the State, now in force or hereafter enacted, the same as if formally incorporated in this State, anything in its articles of incorporation or charter to the contrary, notwithstanding." (161 U. S. 545.) This court held that voluntary compliance with those statutes did not change the character of the original corporation, even so far as to effect the jurisdiction of the Federal courts upon a question of diverse citizenship.

It is, accordingly, clear that, while for many local purposes the consolidated corporation is amenable to the laws of each concurring State, as a domestic corporation, the resulting entity is, in vital respects, beyond the destructive power of any one of the concurring States, even under the reserved power to alter, amend, or repeal corporate charters.

In *Patch v. Wabash R. R. Co.,* 207 U. S. 277, it was held that the Wabash Railroad Company, which was concurrently consolidated under the laws of Illinois, Missiouri, Michigan and Ohio by the consolidation of five other corporations created by the laws of those respective States, was, *as to acts done in Illinois and liabilities under the laws of Illinois,* a citizen of Illinois for the purpose of suit, the court expressly reserving its decision in the event that a case should be presented in which suit was brought in Illinois upon a cause of action which arose in Ohio.

This question saved by the courts in the *Wabash Railroad Case, supra,* is presented in an aggravated form in this case, in which the State of Alabama is attempting to levy a tax based on an issue of stock deriving its sole validity and authority from the act of the Legislatures of Tennessee and Mississippi. There is required no citation of authority to support the assertion that the power reserved by the State of Alabama "to alter, revoke, or amend any charter found to be injurious to the citizens of the State, in such manner that no injustice shall be done to the corporators," confers upon the State of Alabama no authority to discriminate against a corporation occupying the status of the plaintiff in error in favor of exclusively domestic or exclusively foreign corporations performing exactly the same functions within the State of Alabama, or to tax property or a subject-matter or a status not within the tax jurisdiction of the State of Alabama, in violation of the commerce, equality and due-process clauses of the Constitution of the United States.

NO WAIVER OF CONSTITUTIONAL PROVISIONS.

The contention of the defendant in error and of the Alabama courts that the State has plenary authority over the continuation in Alabama of foreign corporations, and a parallel jurisdiction over strictly domestic corporations, through its reserved powers to amend corporate charters or to deal with a corporate status created by it, has lead the lower courts and the representatives of the State to overlook the important limitations formulated and declared in *Western Union Telegraph Company v. Kansas, Southern Railway Company v. Greene,* etc. They have also wholly failed to apprehend the limitation upon State power resulting from the fact that the State has no sort of authority to dissolve the status resulting from the union of the Mississippi and Tennessee companies in the consolidated company. Conceding, solely for argument, that Alabama, under its reserved power, might attempt to annul the consolidation to the full extent of the power or grant of that State, no contention can possibly be made that it could force a liquidation affecting the Mississippi or Tennessee properties or requiring the cancellation or disposition of the stock of

the consolidated company issued under the authority of Mississippi and Tennessee in exchange for the stock of the constituent companies absorbed in those States. We must not be understood as conceding that the State of Alabama could now effectually withdraw its assent from the consolidation and carve out of the consolidated company the original Alabama constituent. That question need not be here considered. What is certain is that the State of Alabama cannot tax that which represents an exertion of the exclusive jurisdiction of the sovereign States of Mississippi and Tennessee.

These considerations are ignored by the representatives of the State and by the lower courts—all treating the consolidated corporation as a strictly domestic concern and within the exclusive regulatory power of Alabama.

To state the principle in another form, Alabama's reserved power to repeal or amend charters certainly goes no further than its original grant. It cannot revoke or destroy that which it did not and could not create. Moreover, the reserved power of the State does not authorize the taking of property without due process, and is subject to the further limitation that the charter alteration proposed must be reasonable and consistent with the scope and object of the act of incorporation.

Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491 (501).
Shields v. Ohio, 95 U. S. 324.
Stearns v. Minnesota, 179 U. S. 223 (259).
Lake Shore etc., R. Co. v. Smith, 173 U. S. 690.

Not even the consent of the stockholders or incorporators of the consolidated company could confer upon the State of Alabama regulatory power over a status or a subject-matter within the exclusive jurisdiction of Mississippi or Tennessee any more effectually than they could enter the State of Alabama for the conduct of interstate commerce and accept a condition that such commerce should become subject to the regulatory power of the State of Alabama—a result universally denounced by the decisions of this court:

"A State may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law, or you may transact business in interstate commerce subject to the regulatory power of the State. To allow a State to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union."

Baltic Mining Co. v. Massachuetts 231 U. S. 68 (83).
Western Union Tel. Co. v. Kansas, 216 U. S. 1 (48).
Southern Pacific Co. v. Denton, 146 U. S. 202.
Harrison v. St. L. & S. F. R. R. Co., 232 U. S. 318.

If individuals could waive inflexible limitations upon State power, enjoined by a constitution reflecting the policy of the whole people, its paramount application could be contracted away at the will of individuals or under compulsion of the very agency whose power is restricted by the Constitution. It is against the policy and letter of that instrument that there should exist in any State of the Union any citizen or "person" within the jurisdiction of any State stripped of constitutional rights, and thus reduced to political pauperization or peonage. That the statute denying a constitutional right applies alike to the people of all States, including the people of the State enacting such statute, does not save it from constitutional objections, as the citizens of a State and corporations of its own creation, being persons within its jurisdiction, have as much right to protection against the unconstitutional enactments of that State as have the people of other States.

Minnesota v. Barber, 136 U. S. 313.
Scott v. Donald, 165 U. S. 58.

Mr. Justice White, in his concurring opinion in *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, put aside the suggestion that the plaintiff in error in that case could not be heard to complain because it must be assumed to have gone into the State and made its investment subject to the exertion by the State of its authority, stating:

> "I concede that the corporation in going in and investing its property within the State did so subject to the right of the State to exert, as to the property thus in the State, all lawful powers which might be called into play as to property so situated; * * * but I cannot assent to the correctness of the contention, in so far as it asserts that the State may suffer a corporation to come into its borders, invest in property therein, and then, after having allowed, by acquiescence or implied invitation, such a situation to arise, the State may treat the corporation as if it had never come in and its property within the State as if it were wholly out of the State, and despoil the corporation of its rights and property upon such false assumption."

And what of the consent of Mississippi and Tennessee to the attempt of Alabama to usurp the jurisdiction of those States? It is certain that neither has consented for the State of Alabama to exert visitorial or taxing power over the status of consolidation created by those States or over the stock resulting therefrom. It is doubtful if they could so consent (U. S. Constitution, Article 1, Section 10) without the approval of Congress.

These weighty considerations are overlooked with a provincial indifference by the learned justices below, who say in putting aside the foregoing principles which distinguish the case from a strictly domestic corporation, and are necessarily applicable by reason of the tri-state status of the plaintiff in error:

> "We do not think there is any basis for such a distinction, and upon the principles and considerations set forth in that case (*K. C., M. & B. R. R. v. Stiles*, 63 South. 734), from which we see no reason to depart, we hold that the demurrer to the complaint was properly sustained, and the judgment is, accordingly, affirmed." (Printed Record, p. 30.)

Thus the plaintiff in error is to be perpetuated as a *strictly* domestic corporation by Alabama, Mississippi and Tennessee, with power in each of those States to tax the status and property subject to the jurisdiction of the other. This result is obviously indefensible.

Respectfully submitted,

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W. F. EVANS,
Of Counsel.

Copies of the foregoing brief and argument have been served upon James P. Stiles, defendant in error, and upon W. L. Martin, Attorney General, and Lawrence E. Brown, Assistant Attorney General, before the filing of the same in this court.

FORNEY JOHNSTON,
Attorney for Plaintiff in Error.

APPENDIX.

CONSOLIDATION STATUTES—CODE OF 1886.

Section 1583 (2008). Consolidation of Railroad Corporations.—Whenever the lines of any two or more railroads, or contemplated railroads, chartered under the laws of this or any other State, which, when completed, may admit the passage of burden or passenger cars over any two or more of such roads continuously without break or interruption, such companies are authorized, before or after completion, to consolidate themselves into a single corporation, in the manner following: The directors of such corporations may enter into an agreement, under the corporate seal of each for consolidation, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of the directors thereof, which shall not exceed thirteen, the time and place of holding the first election of directors, the number of shares of capital stock in the new corporation, the amount of each share, the manner of converting the shares of capital stock in each corporation into shares of the new corporation, the manner of compensating stockholders in each of the two more corporations who refuse to convert their stock into the stock of the new corporation, with such other details as they shall deem necessary to protect such consolidation; and such new corporation shall possess all the powers, rights and franchises conferred upon the two or more corporations, and shall be subject to all the restrictions, and perform all the duties imposed by the provisions of this article. The stockholders in either of such corporations, who shall refuse to convert their stock into the stock of the new corporation, shall be paid at least par value for each of their shares held by them, if they shall so require, previous to the consolidation being consummated. Such agreement of the directors shall not be deemed to be the agreement of the two or more corporations until after it has been submitted to the stockholders of each of the corporations separately at a meeting thereof, to be called upon a notice of at least thirty days, specifying the time and place of such meeting, and the object thereof, to be addressed to each stockholder, when his place of residence is known, and deposited in the postoffice, and published for at least three

successive weeks in one newspaper in one of the cities or towns in which each of such corporations has its principal office of business, and has been sanctioned by such stockholders by a vote of at least two-thirds in amount of the stockholders present at such meeting, voting by ballot in regard to such agreement, either in person or by proxy, each share of capital stock being entitled to one vote. When such agreements of the directors have been so sanctioned by each of the meetings of the stockholders separately, after being submitted to such meetings in the manner above mentioned, then such agreement shall be deemed to be the agreement of the two or more corporations; *Provided*, That every such new corporation so formed shall keep an office in the State of Alabama, and be in all respects subject to the laws of the State of Alabama as a domestic corporation.

Section 1584 (2009). When Merged in New Corporation.—Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the Secretary of State, the two or more corporations mentioned shall be merged in the new corporation provided for in such agreement, to be known by the name therein mentioned; and the details of such agreement shall be carried into effect as provided therein.

Section 1585 (2010). Property and Franchise of Each Corporation Vested in New, and New Corporation Subject to Liabilities of Each.—Upon the election of the first board of directors of the corporation created by such agreement, the rights and franchises of each of the two or more corporations, and their right and interest in and to every species of property, shall be deemed to be transferred to, and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the right of way and all other rights of property in the same manner, and to the same extent as if the two or more corporations had continued to retain the title and transact the business of such corporation; and the titles and the real estate acquired by either of the two or more corporations shall not be deemed to revert, or be impaired by means of anything in this chapter contained. And all rights of creditors, and all liens upon the property of either of the two or more corporations shall be preserved unimpaired; and the respective corporations shall continue to exist, so far as may be necessary to enforce the same. All the debts, liabilities and duties of either corporation shall thenceforth attach to such new corporation, and be enforced from the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it.

SECTION 12, REVENUE ACT OF 1911 (ACTS, 1911, P. 170)

Section 12. Corporations.—All corporations organized under the laws of this State, shall pay annually the following franchise tax: Corporations whose paid up capital stock does not exceed fifty thousand dollars, one dollar per thousand dollars of its paid up capital stock up to and including fifty thousand dollars; corporations whose paid up capital stock exceeds fifty thousand dollars and does not exceed one million dollars, one dollar per thousand on the first fifty thousand dollars, and fifty cents for each thousand dollars of the remainder up to and including one million dollars; corporations whose paid up capital stock exceeds one million dollars and does not exceed five million dollars, one dollar per thousand on the first fifty thousand and fifty cents per thousand for the next nine hundred and and fifty thousand and twenty-five cents for the remainder up to and including five million dollars; corporations whose paid up capital stock exceeds five million dollars, one dollar per thousand on the first thousand, fifty cents per thousand on the next nine hundred and fifty thousand, and twenty-five cents per thousand on the next four millions, and ten cents per thousand on all of the remainder. All corporations organized under the laws of any other State, nation or territory, and doing business in this State shall pay annually the following franchise tax: Corporations whose actual amount of capital employed in this State does not exceed fifty thousand dollars, one dollar per thousand on the amount of capital actually employed in this State up to and including fifty thousand dollars; corporations whose actual amount of capital employed in this State exceeds fifty thousand dollars and does not exceed one million, one dollar per thousand for the first fifty thousand and fifty cents per thousand on the remainder up to and including one million dollars; corporations whose actual amount of capital employed in this State is more than one million and does not exceed five million dollars, one dollar per thousand on the first fifty thousand, and fifty cents per thousand on the next nine hundred and fifty thousand and twenty-five cents per thousand on the remainder up to and including five millions; corporations whose actual amount of capital employed in this State is more than five million dollars, one dollar per thousand on the first fifty thousand, fifty cents per thousand on the next nine-hundred and fifty thousand, twenty-five cents per thousand on the next four million, and ten cents per thousand on the remainder. In ascertaining the amount of the annual franchise tax which shall be paid by any foreign corporation doing business in this State, under this section, there shall be deducted from the amount of the capital employed by such corporation in this State the aggregate amount of

loans of money made by such corporation in this State and which shall be secured by existing mortgage or mortgages to it on real estate in this State and upon which mortgages there shall have been paid the recording privilege tax provided by law. And the payment of such privilege tax shall not exempt any corporation from the payment of a license or licenses for engaging in or carrying on its business or occupation for which a license is required of an individual or partnership. Where application is made by a domestic corporation for the license herein provided, it shall be accompanied by the affidavit of the president or other chief officer of the corporation, showing the amount of capital stock of such corporation, and where application is made for the license herein provided by foreign corporation it shall be accompanied by the affidavit of an agent of said corporation showing the amount of capital actually employed by said corporation in this State; and the payment of this tax in one county in this State as evidenced by the license or certificate of the Judge of Probate, shall be sufficient; provided that the provisions of this subdivision shall not apply to banks and banking institutions and building and loan associations regularly organized under the laws of this State or the United States, nor shall it apply to strictly benevolent, educational or religious corporations. Provided the payment of the franchise tax required by this article in any one county shall be sufficient, notwithstanding the said corporation may do business or have a resident agent in more than one county.